(19,036.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 385.

C. P. COOK AND ED. PLUNKETT, PLAINTIFFS IN ERROR,

vs.

THE COUNTY OF MARSHALL, STATE OF IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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1 In the Supreme Court of Iowa, October Term, A. D. 1901.

C. P. Cook and Ed Plunkett, Appellants,
vs.
Marshall County, Appellee.

Appeal from Marshall district court, Hon. G. W. Burnham, judge.

Dunshee & Dorn, attorneys for appellants.
J. Parker, of counsel.
Hon. Henry Stone, county att'y, for appellee.

Appellants' Abstract of Record.

On the 23d day of January, 1899, the appellants, after due notice, filed in the office of the auditor of Marshall county a duly verified

Petition

in words and figures following, to wit:

"To the honorable board of supervisors, Marshall county, Iowa:

Your petitioners hereby represent to your honorable body
2 that the undersigned C. P. Cook is engaged in business in the room known as No. 508 S. 3d Ave., in the city of Marshalltown, Iowa, as a dealer in tobacco, cigars, cigarettes, and like merchandise. That the undersigned Ed. Plunkett is the owner of the building in which said business is being carried on. That heretofore, to-wit, on the 10th day of December, 1898, W. B. Elliott, assessor of the city of Marshalltown, Marshall county, Iowa, in accordance with the provisions of the statutes of Iowa relative to the sale of cigarettes returned to the county auditor the names of the undersigned as persons who have been engaged in carrying on business in cigarettes and maintaining a place where cigarettes are sold in violation of law. That the county auditor has certified the names of the undersigned to the county treasurer as persons who are liable to the mulct tax by virtue of the provisions of the law of the State relative to the sale of cigarettes and the county treasurer has entered the names of the undersigned upon his books as liable to the quarterly installment of the mulct tax and to make the same a lien on the premises in question which are more fully described as follows, to-wit:

Lot 9, block 2, Ausrus addition.

That as petitioners are advised and believe they are not and neither of them is liable to said mulct tax provided in said statute and for the following reasons and on the following grounds, to-wit:

The said C. P. Cook as occupant, has not been since Sept. 30, 1898, engaged in the business of selling, giving away, bartering, or ex-

changing any cigarettes or cigarette paper except cigarettes bought by him from the American Tobacco Company, a corporation of the State of New Jersey having no place of business within the State of Iowa:

3 That said C. P. Cook has not at any time since said 30th day of September sold, given away, bartered, or exchanged any cigarettes or cigarette paper except those so bought from said American Tobacco Company as aforesaid and by said American Tobacco Company shipped to said C. P. Cook from beyond the limits of the State of Iowa; and the only sales made by said C. P. Cook have been of cigarettes in the original packages delivered by said American Tobacco Company to a common carrier without the State of Iowa and delivered by said common carrier to said C. P. Cook in the State of Iowa:

That because said C. P. Cook has not sold, given away, bartered nor exchanged any of the articles mentioned in said statute, it being section 5007 of the Code of 1897 of Iowa, except such as were sold by him in their original packages as aforesaid, petitioners are advised and believe that said statute section 5007 is as to such sales an attempted interference with and burden on interstate commerce and is therefore in contravention of that clause of the Constitution of the United States which gives to Congress the exclusive right to control inter-state commerce, and is void.

That the premises described above have not been used for the sale of any articles affected by said section 5007 of the Code of 1897 except for the sale of cigarettes as above described.

That the only cigarettes that have been sold by said C. P. Cook on said premises as aforesaid since September 30th, 1898, have purported to have come to him from the American Tobacco Company at St. Louis, in the State of Missouri, and have come to him in the identical package in which said C. P. Cook sold them without any box, bale, wrapping or covering of any kind. That each of said packages is a complete package of pasteboard

4 with the revenue stamp of the United States so pasted across at the end that the stamp would have to be destroyed before the contents of the package could be removed and complying in every respect with the provisions of the United States revenue law for the packing, shipment and sale of cigarettes. Wherefore, the said undersigned respectfully pray that the said tax may be remitted and held for naught."

C. P. COOK.

(Duly verified.)

That thereafter, on the 31st day of January, 1899, appellants filed in the office of the auditor of Marshall county, in support of said petition the following

Affidavit,

to-wit:

"STATE OF MISSOURI, } ss:
City of St. Louis, }

"Personally appeared before me, Joseph Lathrop, a notary public in and for the city of St. Louis, and State of Missouri, Thomas Donellan, who being duly sworn deposeth and saith:

I am an employee of the American Tobacco Company, at its factory and place of business at the corner of 16th and Walnut streets in the city of St. Louis. I am engaged in the packing for shipment of smoking tobacco and in attending to the shipment of cigarettes from this point; I have been so employed since May, 1898. On behalf of the American Tobacco Company and by direction of my superior, I have shipped cigarettes to C. P. Cook at Marshalltown, Iowa, from time to time since the 1st day of October, 1898. The packages shipped were each of paste board boxes containing — Sweet Caporal cigarettes; these paste board boxes were all in accordance with the internal revenue law regulating the packing, shipping, and sale of cigarettes; each of the packages being sealed by the internal revenue stamp so that such stamp would have to be destroyed before the package could be opened or its contents exposed; these packages were shipped to C. P. Cook, absolutely loose, or at least neither the American Tobacco Company, nor myself or any one of its other employees for it furnished any box, bale, bag, wrapping or other covering for these packages nor in any way attached them together. These packages were not separately addressed nor were any of them addressed but at the time they were delivered to the driver of the U. S. Express Co., which express company was the common carrier to whom the delivery was made, the said driver took a duplicate of the receipts he had given. These receipts showed the number of packages and the name of the person to whom they were to be sent and from its duplicate receipts I suppose the express Co. had notice of the number to be delivered and the name of the consignee and his address. I know that no cigarettes have been shipped from this place to said C. P. Cook, at Marshalltown, Iowa, since the 1st day of October, 1898, except cigarettes which have been shipped in the manner above outlined.

THOMAS DONNELAN."

"Subscribed and sworn to before me by the said Thomas Donellan this 27th day of January, 1899.

JOSEPH LATHROP,
[SEAL.] *Notary Public, City of St. Louis, Mo.*

My term expires July 11th, 1901."

That thereafter on the 3rd day of April, 1899, the said petition came on in regular order to be heard before the board of supervisors at a regular session and the board of supervisors having heard the evidence refused to grant the petition.

Thereafter and within due time, an appeal was perfected by the appellants from the decision of the board of supervisors to the district court of Marshall county, Iowa, and the foregoing record was duly certified by the county auditor as by law required to the office of the clerk of the district court.

Thereafter and on the 1st. day of April, 1901, appellees filed their

Demurrer

as follows, to-wit:

Come now the Board of Supervisors of Marshall County, Iowa, and demur to the petition of C. P. Cook and Ed. Plunkett and the said amendment thereto for the reason that the facts therein stated do not entitle the petitioners to the relief asked or to any relief.

Thereafter and on the 26th. day of February, 1901, appellants filed in the office of the clerk of the district court of Marshall county, Iowa, the following

Amendment to Petition.

"Come now the petitioners and for amendment to their petition show to the court that section 5007 of the Code of Iowa, being the law under which the said taxing officers pretend to be acting, is a portion of title XXIV of the Code, which portion of the Code was enacted under the following title, to-wit: "An act to revise, amend and codify statutes in relation to crimes and punishments;" that said section 5007 of the Code of Iowa never had any other enactment than under said title; that the subject matter of said sections is not included in the object as set out in said title, but said section has to do with the assessment, levy and collection of taxes
7 and special assessments; and is not in relation to crimes and punishments; that therefore, as plaintiffs are advised and verily believe, said section of said article provides:

'SEC. 29. Every act shall embrace but one subject and the matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.'

That as plaintiffs are further advised and verily believe, on account of said invalidity of said statute as aforesaid, the said pretended assessments and levies and said tax are wholly void and unenforceable.

Wherefore, your petitioners pray that said proceedings of the taxing officers of said county and its board of supervisors in refusing to

grant the prayer of petitioners be and of no effect; that the judgment of said board of supervisors in refusing to grant the praying of petitioners be reversed and set aside; that the said assessments be cancelled and annulled, and for judgment for costs and for such other and further relief as in the premises may seem equitable."

(Duly verified.)

Thereafter and on the 4th. day of April, 1901, the appellants filed another

Amendment to Petition

as follows, to-wit:

"Come now the petitioners and for further amendment to their petition (such further amendment having order of court sustaining it) show to the court that section 5007 of the Code of Iowa, being the law under which the taxing officers are acting, in its pro-
8 vision that its provisions shall not apply to the sales of jobbers and wholesalers in doing an inter-state business with customers outside of the State, is in violation of the fourteenth amendment of the Constitution of the United States in that it denies to your petitioners the equal protection of the laws and your petitioner is a person within the jurisdiction of Iowa; and in that said provision is in violation of the sixth section of article 1 of the constitution of Iowa which provides that all laws of a general nature shall have a uniform operation.

That as petitioner is advised the said law is therefore invalid and said pretended assessments and levies and said tax are wholly void and unenforceable."

(Duly verified.)

On the 4th. day of April, 1901, the cause was tried at the court house in Marshalltown, Iowa, before Honorable G. W. Burnham, presiding judge, on the defendants' demurrer to the petition and amendments thereto and the following proceedings were had, done and entered of record, to-wit: "Now, to-wit, April 4th., 1901, this cause coming on for hearing to the court, plaintiff has leave of court to file an amendment to his petition. Defendants' demurrer now on file to apply to the amendment."

Thereafter said demurrer was sustained and the following proceedings were had, done and entered of record; "Now, to-wit, June 7th., 1901, this cause coming on for judgment of the court on the demurrer of defendant to plaintiff's petition and the amendments thereto, sustained. To which ruling of the court plaintiffs except, plaintiff having elected to stand upon his petition, the petition is dismissed and judgment entered against the plaintiff for costs. To which judgment of the court the plaintiff excepts. The as-
9 sessment of the tax against plaintiff's property confirmed. To which plaintiff excepts."

On the — day of June, 1901, the appellants perfected an ap-

peal to the supreme court of the State of Iowa by serving upon the appellees and the clerk of the district court of Marshall county, a notice of appeal and filing a supersedeas bond with sureties approved by the clerk of the district court, and secured to the clerk fees for transcript.

The foregoing abstract is full, true and correct and contains all the pleadings in said action, all the evidence offered and received, all the agreements, stipulations and admissions of the parties and everything which is of record in said cause and all matters referred to in said abstract are of record in said court and cause.

We hereby certify that the cost of printing the foregoing abstract is $—.

DUNSHEE & DORN,
Attorneys for Appel-ants.
J. PARKER, *Of Counsel.*

10 (Supreme Court of Iowa, Feb. 2, 1903.)

COOK ET AL.
v.
MARSHALL COUNTY.

Appeal from district court, Marshall county, G. W. Bur-ham, judge.

The opinion states the case. Affirmed.

Dunshee & Dorn (J. Parker, of counsel) for appellants. Henry Stone for appellee.

WEAVER, *J.:*

The appellant Cook is a dealer in tobacco, cigars, and cigarettes, carrying on his business in a building owned by Plunkett, the other appellant, in the city of Marshalltown. A mulct tax having been assessed against Cook under the provisions of section 5007 of the Code, appellants petitioned the board of supervisors to remit and cancel such tax on the ground that no cigarettes had ever been kept, sold, or given away by Cook except in the original packages made by the manufacturer in another State, and in that form shipped directly to him in this State, and that, therefore, the section of the code referred to as applied to such sales is in violation of the Constitution of the United States, which reserves to Congress the right and power to regulate interstate commerce. This petition was supported by affidavit of an employé of the shipper at St. Louis, in the State of Missouri, that the cigarettes sold and shipped to Cook were done up in pasteboard boxes containing 10 cigarettes each (the printed record leaves a blank for the number in each box, but counsel for appellants state the number to be 10, and we will so consider it.) The affidavit further states that the packages were separately sealed and stamped with a revenue stamp, and adds that: "These packages were shipped to C. P. Cook absolutely loose, or at least

neither the American Tobacco Company nor myself or any one of its other employés for it furnished any box, bale, wrapping, or other covering for these packages, nor in any way attached them together. These packages were not separately addressed, nor were any of them addressed, but at the time they were delivered to the driver of the U. S. Express Co., which express company was the common carrier to whom the delivery was made, the said driver took a duplicate of the receipts he had given.

11 These receipts showed the number of packages and the name of the person to whom they were to be sent, and from its duplicate receipts I suppose the express company had notice of the number to be delivered and the name of the consignee and his address." This petition being refused, an appeal was taken to the district court, where an amendment was filed, alleging that the statute providing for the mulct tax is invalid, because the subject-matter of said section 5007 is not expressed or indicated in the title to the act in which it is found, as provided in the constitution of this State, and because it discriminates in favor of jobbers and wholesalers doing an interstate business. A demurrer to the amended petition, as stating no ground or fact entitling petitioners to the relief demanded, having been sustained, and judgment entered against them for costs, the petitioners appeal.

1. We first consider whether the petitioners show themselves entitled to the protection afforded by the interstate commerce clause of the Federal Constitution. It is asserted that the traffic in which Cook was engaged was the receiving and selling of cigarettes in the original packages as shipped from the manufacturer in another State, and is therefore lawful under the rule applied in Leisy *v.* Hardin 135 U. S. 100, and other cases of the same general nature, decided by the Supreme Court of the United States. So far as this branch of the case is concerned the question is whether 10 cigarettes, put up, handled, shipped, and sold in the manner indicated by the petition, is such an "original package" as is meant by the authorities which the appellant relies upon. As an original proposition, addressed to common sense, aided by a conscience of average enlight-ment, and uncomplicated by precedent, there would seem to be no room for doubt that this question should be answered in the negative. It must be admitted, however, that authorities are not wanting affording the appellants some ground to believe that any scheme or device, no matter how transparent the fraud, is sufficient to baffle the power of a sovereign State so long as it bears

12 the magic legend "original package." This theory is founded upon what has been supposed to be the holding of the court of last resort in the cases already referred to; but, as we view it, those decisions do not justify the deductions made. The term "original package" is not to be found in the Constitution, and has come into use simply as a convenient term or expression for one of the incidents ordinarily inseparable from interstate commerce. The term "imports" or "foreign commerce," or "interstate commerce" always implies the idea of goods, wares, or merchandise manufact-

ured, produced, or prepared in one jurisdiction, and carried into another for the purpose of sale. There can be no such commerce without transportation or carriage. For convenience and safety in such transportation, most articles of commerce being shipped to an importer or buyer are combined into packages, encased in boxes or other wrapping, and directed to the proper consignee. In this form they do not ordinarily enter into the retail or general trade of the community, and the fact that the package is unbroken is an indication that the goods have not yet lost their distinctive character as imports, or become mingled with the mass of property subject solely to the jurisdiction of local authority. The recognition of this feature by Chief Justice Marshall in Brown *v.* Maryland, 12 Wheaton 419, is the foundation on which all subsequent "original package" decisions in the various courts of the land are sought to be justified. In this, as in some other notable instances, the principle then announced has been so distorted and wrested from its original simple meaning, that, if the great jurist were permitted to return to the scene of his historic labors, he would doubtless hesitate long before acknowledging the legitimacy of the descent of the modern doctrine. It should not be overlooked that the pronounc-ment of Chief Justice Marshall upon which such reliance is placed was made in reference to foreign commerce only, and that the words so often quoted were employed in discussing the constitutional prohibition of duties and imposts by State authorities, and did not involve any consideration of interstate commerce. Wood-
13 ruff *vs.* Parham, 8 Wall. 123. This distinction is noted and emphasised in the majority opinion in the late case of Austin *vs.* Tennessee, 179 U. S. 343, hereinafter more particularly referred to. The term "original package," as employed in law, admits of no precise definition applicable to all cases. Generally, it is said to be a parcel, bundle, bale, box or case made up of or "packed" with some commodity with a view to its safety and convenient handling in transportation. Keith *v.* State, 91 Ala. 2, State *v.* Board 46 La. 146, Austin *v.* State 101 Tenn. 563, Com. *vs.* Schollenberger, 156 Pa. St. 201, It does not necessarily mean that goods shall be inclosed in a tight or sealed receptacle. Cone *v.* McGregor 104, Iowa, 465, State *v.* Chapman, S. Dak. 114, It relates wholly to goods as prepared for transportation, and has no necessary reference whatever to the package originally prepared or put up by the manufacturer. Indeed, the idea of an original package may well be made to cover certain forms of property which do not ordinarily admit of being "packed" or encased in any other manner than in the car or vessel in which they are transported. Such, for instance as steel, beams, threshing machines, and other bulky articles. Whether, in such cases, the unit or package for the purposes of interstate commerce is the car load, or cargo, or the entire consignment, or the individual articles of which the consignment is composed, is unnecessary for us to consider. Fortunately, as regards the very class of goods now in controversy we are not left without a controlling precedent.

Austin *vs.* Tennessee *supra*, recently decided by the Supreme Court of the United States, upholds the constitutionality of a statute of Tennessee prohibiting the sale of cigarettes in that State. There as here, the nonresident manufacturer and the resident agent or dealer, aided by a superservic-able common carrier, undertook
14 to convert the interstate commerce privilege afforded by the Federal Constitution into a shield behind which to violate the law of the State with impunity. The plan adopted may be explained as follows: To conform to the internal revenue law of the United States, the manufacturers put the cigarette into small pasteboard boxes of 10 each. These boxes are about 3 inches in length and 1½ inches in width, a convenient size for the vest pocket of the schoolboy or man addicted to the use of tobacco in that form. In filling an order for these goods from a State where the traffic is unlawful, the seller, instead of packing the requisite dozens or hundreds or thousands of boxes in a larger box or package, as would be done in legitimate commercial transactions generally, placed the small boxes in a loose pile upon the floor of his warehouse, and notified the carrier, who came, gathered up the consignment in a basket, and put it in course of transportation to the consignee. By this device it was claimed that each box of cigarettes was to be considered an original package, which the importer might lawfully receive, hold, and sell without let or hindrance by the State authorities. The adoption of this doctrine would, of course, prove absolutely destructive of the right of the State to place any ban whatever upon the sale of this class of goods. The cause of good government and good morals is to be congratulated, however, upon the fact that a majority of the court refused to allow the last vestige of the police power of the State for the protection of its people to be thus obliterated. The opinion says: "The real question in this case is whether the size of the package in which the importation is actually made is to govern, *or the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different States.* We hold to the latter view." The words we have italicized appear to afford the only proper or efficient test of this troublesome question as to what is an original package for the purposes of interstate commerce. Even this definition is capable of being abused at times to the detriment of the interests of the States, but in a much smaller degree than any yet attempted. The further discussion by the court is so lucid and convincing in
15 statement, and so applicable to the case at bar, we further quote: "The whole theory of the exemption of the original package from the operation of State laws is based upon the idea that the property is imported in the ordinary form in which from time immemorial foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the State. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But

taking the words 'original package' in their literal sense, a number of so-called 'original package' manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products in-to other States in minute packages, that they may at once go into the hands of the retail dealers and consumers. and thus bid defiance to the laws of the State against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into the hands of the consumer, or be used to evade the police regulations of the State with regard to the particular article. No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law, but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and in a *bona fide* package of a particular size. Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another State, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court had repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several States, we are bound to respect such laws, and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The conse-
16 quences of our adoption of defendant's contention would be far-reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister State, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loosely; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside of the State, and import it in minute quantities. There could hardly be stronger evidence of fraud than is shown by the facts of this case. * * * Now, the result of defendant's argument in this case is that citizens of Tennessee may, under the commerce clause of the Constitution of the United States, bring into that State from other States cigarettes in unlimited quantities, and sell them despite the will of Tennessee as expressed in its legislation. In other words, it is decided that the commerce clause of the Constitution, by its own force, without any legislation by Congress, overrides the action of the State in a matter confessedly involving, in the judgment of its legislature, the health of its people. We can not accept this view. The doctrine that the silence of Congress as to what property may be of right carried from one State to another means that every article of commerce may be carried into one State from another, and there sold, ought not to be extended so as to embrace articles which may not un-

reasonably be deemed injurious in their use to the health of the people. If this be not so it follows that the reserve power of the State to protect the health of its people by reasonable regulations has application only in respect of articles manufactured within its own limits, and that an open door exists for the introduction into the State against its will of all kinds of property which may be fairly regarded as injurious in their use to health." To the usual effort to bring this kind of traffic within the principle of Brown *v.* Maryland, the court quotes the language of Chief Justice Marshall, and adds: "This sentence contains in a nutshell the whole doctrine upon the subject of original
17 packages upon which so formidable a structure has been attempted to be erected in subsequent cases. Whether the decision would have been the same if the original packages in that case, instead of being bales of dry goods, or hogsheads, barrels, or tierces of liquor, had been so minute in size as to permit their sale directly to consumers, may admit of considerable doubt. Obviously, the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import goods from foreign countries. It is safe to assume it did not occur to the Chief Justice that by a skillful alteration of the size of the packages the decision might be used to force upon a reluctant people the use of articles denounced as noxious by the legislatures of the several States."

The scheme by which the tobacco company attempts to circumvent the laws of the State is appropriately denounced in the opinion as "a discreditable subterfuge, to which this court ought not to lend its countenance." The only point upon which counsel attempts to distinguish between the Austin case and the case at bar is in the fact that in the former it appears affirmatively that the express company made use of a basket in removing the loose pile of small pasteboard boxes from the floor of the company's warehouse, while in the latter no mention is made of the basket. The petition and affidavit, which constitutes the showing here made, are drawn with much carefulness and skill to make it clear that "neither the American Tobacco Company nor any of its employés furnished any box, bale, bag, wrapping, or any covering for these packages, nor in any way attached them together," and that in this condition, without any mark or address upon them, they were delivered to the express company.

The care and precision with which we are told what the tobacco company did not do in making the shipment is no less conspicuous than the omission to tell what its agent, the express company, did do in that regard. We think, however, it indicates no such material
18 variance in the facts of the two cases as to effect the application of the rule. Conceding that the tobacco company scrupulously refrained from doing more than counting and pointing out the loose packages to the express company with directions to carry the same to the buyer in Marshalltown, yet we know, as a matter of common observation and immemorial usage, that this is not

the manner "in which *bona fide* transactions are carried on between the manufacturer and wholesale dealer residing in different States," and is, therefore, not entitled to claim the exemptions attaching to interstate commerce. Still further we may rightfully assume that the express company, in receiving and shipping these little boxes, did it in a rational manner, not by handling or carrying the boxes as ants carry sand, one grain at a time, but by gathering them, if not in baskets in receptacles of some suitable and convenient kind; and in such case, under the doctrine of McGregor *v.* Cone, *supra*, the receptacle so used would be the original package, if indeed, there be anything in the transaction entitled to that appellation. The extreme and unreasonable extension of the principle affirmed in Brown *v.* Maryland has been the fruitful source of much annoyance and embarrassment in many of the States of the Union. And it is a striking, but just, commentary upon the perversion of the principle embodied in that decision, to note that practically the only beneficiaries of the modern doctrine of the sanctity of original packages in interstate commerce are the whisky seller, the cigarette manufacturer, and the dealer in bogus butter,—a trinity which finds it profitable to force its wares upon States whose people, speaking through their constituted authorities, seek to exclude them as injurious to public health and morals. The demoralization thus resulting upon a denial of the right of the State to protect the lives, health, and morals of its people is not overstated by Williams, J., in Com. *v.* Schollenberger, *supra*, decided by the supreme court of Pennsylvania. Speaking of the claim there made that certain sales of oleomargarine in violation of a local statute were privileged, as being interstate commerce, he says: "Law-abiding citizens will not embark in a business which is forbidden by the laws of the State in which they live. Timid men
19 are afraid to do so. This kind of operation is left, therefore, to those who have no respect for law, no interest in the public welfare, and no fear of public opinion. When such men deliberately determine to put money in their pockets by engaging in a business which the State has declared to be injurious to the public morals, the public health, or the public peace, and has therefore, forbidden altogether, or placed under strict police regulations, they are morally certain to seek immunity for themselves and their unlawful business be immediate flight to the sanctuary of the national Constitution, and there laying hold on the horns of the altar of interstate commerce. The road to this refuge of lawbreakers is well beaten. There are signboards at every crossing on the route, and the intermediate stations for profitable rest wear conspicuous signs of invitation. The travelers over it are generally foreigners to the State whose laws they trample upon, and include a motley assortment of traders. Beginning with the peripatetic swindlers whose worthless wares are transported in tin trunks, which they carry in their hands, and who hunt their victims in secluded villages and along country roads, with an instinct that rarely fails, and running up or down the scale of lawbreakers to the men whose commercial

operations extend to the sale of oleomargarine by the pound, and of intoxicating drinks by the pint, there is no man in the procession who is not a conscious and deliberate lawbreaker, and who does not set his possible profits from a forbidden business above his duty to society or the State that protects him. These men seek to pervert a rule of law that has a wide and beneficial field of operation. They claim to be engaged in interstate commerce, and to be entitled to the protection of the General Government, and against the police laws of the individual States, for that reason. * * * The mischief done and attempted in the manner under the guise of interstate commerce is so great, so open, and so difficult to suppress or punish that in many States besides this it has become a matter of general and sincere regret that the interstate commerce law was ever held applicable to trade in any article recognized throughout the civ-
20 ilized world as a proper subject for police regulation and control." The decision of the Supreme Court of the United States which reversed the holding of the State court in these oleomargarine cases—Schollenberger *v.* State, 171 U. S. 1,—turns principally upon the effect of a special verdict of the jury and serves neither to dull nor turn aside the point of the quotation we have made. The duty of the courts to apply every available and legitimate remedy for the evils thus graphically set forth is plain. The case made by the appellants to bring their business within the privileges of interstate commerce is wholly without merit, and the holding of the trial court in respect thereto is clearly correct.

2. It is urged by appellants with much earnestness that the statute under which the disputed tax was levied is void, because it does not conform to section 29 of article 3 of the constitution of this State. The provision to which reference is made reads as follows: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." Section 5007 of the Code, to which objection is here raised is found in title 24, "Of crimes and their punishment," and sub-title (chapter 11) "Of offenses against public policy." The general title of the bill as it passed the legislature is "An act to revise, amend and codify the statutes in relation to crimes and their punishment." Section 5006 in chapter 11 prohibits the keeping for sale and selling and giving away of cigarettes under a penalty of fine and imprisonment. Section 5007 provides that "there shall be assessed a tax of $300 per annum against every person, partnership or corporation and upon the real property within or whereon any cigarettes * * * are sold or given away or kept with intent to be sold or bartered or given away under any pretext whatever. The tax is to be assessed and collected after the matter of the mulct liquor tax, but is not a bar to a prosecution for the penalties provided in section 5006. Both sections exempt from their provisions "Jobbers and wholesalers doing an interstate business with persons outside of the State." The question arises whether section 5007 comes fairly within the
21 scope of the title. The end sought to be obtained by the constitutional provision invoked by the appellants "was to prevent

the union in the same act of incongruous matters and of objects having no connection, no relation. And with this it was designed to prevent surprise in legislation by having matters of one nature embraced in a bill whose title expressed another. State *v.* Davis Co. Judge, 2 Iowa, 281. This, it has ofter been held, does not require a construction forbidding the inclusion in one act of all matters germane to the main proposition or purpose sought to be affected, even though they are not specifically mentioned in the title. If there is a "unity of object" in the various provisions, and that general object is indicated by the title, then, no matter how multifarious the provisions of the act, it sufficiently complies with the constitution. Santo *v.* State, 2 Iowa, 208; Morford *v.* Unger, 8 Iowa, 85; Porter *v.* Thomson, 22 Iowa, 391. In this connection we may well note the development of this provision in our constitution, and the language in which it is framed. In the constitution of 1846 it appears in these words (article 3): "Sec. 26. Every law shall embrace but one object, which shall be expressed in the title." Seemingly to avoid the embarrassments which might arise from a narrow construction of the rule as thus expressed, the framers of the present constitution changed it to read: "Every act shall embrace but one subject *and matters properly connected therewith* which subject shall be expressed in the title." The added words which we have italicized are highly important, and clearly indicate the intention that the rule shall be liberally interpreted. It is the general policy of every State in the Union to collect and restate from time to time the whole body of its statute law in a complete and systematic form or code, and we think it has never been held by any court that this assembling under one head of various enactments tending to the same general object is not valid under the constitution. Any other conclusion would render valueless all efforts at codification. In Johnson *v.* Harrison, 47 Minn. 575, we
22 find the following clear and forceful discussion of the principle: "Any construction of this provision of the constitution that would interfere with the very commendable policy of incorporating the entire statutory law upon one general subject in a single act, instead of dividing it into a number of separate acts, would not only be contrary to its spirit, but also seriously embarrassing to honest legislation. All that is required is that the act should not include legislation so incongruous that is could not by any fair intendment be considered germane to the general subject. The subject may be as comprehensive as the legislature chooses to make it, provided it constitutes, in the constitutional sense, a single subject, and not several. The connection or relationship of several matters such as will render them germane to one subject and to each other can be of various kinds; as, for example, of means to ends, of different subdivisions of the same subject, or that all are designed for the same purpose, or that both are designated by the same term. Neither is it necessary that the connection or relationship should be logical. It is enough that the matters are connected with and related to a single subject in popular signification. * * * Neither

is the fact important that a law contains matters which might be and usually are contained in separate acts, or would be more logically classified as belonging to different subjects, provided only they are germane to the general subject of the act in which they are put. The legislature is not limited to the most logical or philosophical classification." Another court has said: "It is not intended to prohibit the uniting in one bill of any number of provisions having one general object fairly indicated by its title. The unity of the object must be sought in the end which the legislative act purposes to accomplish." State *v.* Town of Union, 33 N. J. Law, 351; Montclair Tp. *v.* Ramdell, 107 U. S. 147. "The constitution is obeyed if all the provisions relate to the one subject indicated in the title, and parts of it, or incident to it, or reasonably connected with it, or in
23 some sense auxiliary to the object in view." Ritchie *v.* People, 155 Ill. 98, Bobel *v.* Same, 173 Ill. 19. It is admissible to include in a statute "means which are reasonably adapted to secure the objects indicated by the title." Cohn *v.* People 149 Ill. 486, To the same general effect, see Cooley, Const. Lim. (4th ed.) 175–178; Lacey *v.* Palmer, 93 Va. 159, Ewing *v.* Hoblitzelle, 85 Mo. 64; Grover *vs.* Trustees, 45 N. Y. Law, 401; State *vs.* Silver, 9 Nev. 231; Fahey *v.* State, 27 Tex. App. 146, Van Brunt *v.* Town of Flatbush, 128 N. Y. 50 State *v.* Mines, 38 W. Va. 137,

Accepting the foregoing as announcing the correct rule of interpretation, we have next to inquire of the socalled "mulct tax" is in any sense germane to the general purpose of the act in which it is found. Bear in mind that this statute as a whole is an attempt to restate not only the law defining crimes and misdemeanors, but the remedies to be applied for suppressing and punishing the same. It certainly was competent for the legislature under the head so designate those acts which, in its wisdom, should be forbidden as against public policy, and to include therein the traffic in cigarettes. The authorities to this effect are too numerous and familiar to require citation. In codifying theses statutes the legislature found already upon the statute book the prohibition now carried into section 5006 (see Laws 26th Gen. Assem. c. 96) and in carrying it into the Code amended it by adding thereto section 5007, providing for the mulct. That it was intended as an aid in suppressing and punishing violations of the provisions of the preceding section seems too clear for controversy. While called a "tax" it is a "mulct" tax, and a mulct is a fine imposed for an offense, a penalty." See "mulct," And. Law Dict., Ebersole, Law Dict., Cent. Dict. It is not even a form of license by indirection, it contains no "bar clause" but, on the contrary, expressly provides that it may be exacted in addition to the penalties named in section 5006. The end sought by
24 both these sections is identical,—the suppression and prevention of the traffic in cigarettes. To use the language of the authorities to which we have referred, there is here a "unity of object," and the mulct is manifestly an auxiliary to the end sought to be accomplished. It is not wholly unlike those familiar enactments which provide for the punishment of a crime or misdemeanor,

and unite them with a provision for assessing further penalty or damages in a civil proceeding. For instance, section 4822 of the Code authorizes punishment for malicious trespass, and, in addition thereto, authorizes the owner to recover three times the amount of his actual damage from the trespasser in a civil proceeding. Section 4834 prescribes the penalty for larceny of logs and timber floating in the rivers of the State, and is followed by section 4835, which subjects any person thus offending, whether convicted thereof in a criminal proceeding or not, to pay the owner of the stolen property twice the value thereof. If section 4835 can properly be held germane to the general purpose indicated in section 4834 (and we think none will dispute it), we see no good reason for applying any different rule to the sections to be construed in the case before us. Other instances of like legislation will readily suggest themselves in which a "tax" or "mulct" or "penalty" is provided as an additional weapon in the hands of the State for enforcing obedience to its commands. It must be remembered that title 24 of the Code is no more than what it purports to be,—"An act to revise, amend and codify" statutes already existing. Those statutes, we must assume, were properly entitled; at least, no objection is raised thereto by appellants. Such being the case, if the title to the original act or acts is sufficient to embrace the matters covered by the provisions of the act amendatory thereof (and, as we have said, no objection of that nature is here raised), it is unnecessary to inquire whether the title to the amendatory act would of itself be sufficient. Morford *v.* Unger, 8 Iowa, 85; Brandon *v.* State, 16 Ind. 197; Yellow Pk. Co. *v.* Arnold, 46 Wis. 214; State *v.* Ranson, 73 Mo., 18; State *v.* Algood, 87 Tenn., 163; Com. *v.* Brown, 91 Va., 762; People *v.* Parvin (Cal.), 14 Pac. Rep., 783; Lankford *v.* Co. Com. (Md.), 20 Atl. Rep., 1017. It may be that in a matter of original legislation a proper observance of the constitution would require the separation into separate acts of matters which we hold it proper to combine in a single general measure of amendment, revision, or codification. But that phase of the question is not now before us, and we need not consider it. It is not improper, however, to observe that by the adoption of the Code of 1897 the entire body of the statutory law of this State, consisting of many hundred separate acts, was classified and combined under 26 titles. Each of these titles of necessity contains widely variant provisions, but all having more or less appropriate relation to the general topic to which such title is devoted. To adopt the strict doctrine for which appellants contend would unsettle the validity of a multitude of Code provisions, and open the door to legal chaos. True, even such an unfortunate result should not deter the court from accepting and announcing a rule which is clearly right, but it is a good and sufficient reason why we should pause and refuse to take a position attended with such grave consequences until its propriety and correctness are demonstrated beyond reasonable doubt. Moreover, it is a well-established principle, which this court has often applied, that it is a duty of the courts to give such a construc-

tion to an act, if possible, as will avoid the necessity of holding it void for unconstitutionality. State *v.* Weir, 2 Iowa, 282. It is a power which will not be resorted to unless the case be clear, decisive, and unavoidable. Santo *v.* State, *supra.* A late case decided by the supreme court of California—Lewis *v.* Dunne, 66 Pac. R.—holds that an act embodying numerous amendments to different sections of the Code, and repealing others, is unconstitutional, but the validity of acts of general revision and codification under general and comprehensive titles is supported by the great weight of authori-
26 ties. *Central of Georgia R'y Co. v. State,* 104 Ga., 831; Mathis *v.* State, 31 Fla., 291; McLane *vs.* Paschal, 8 Tex. Civ., 711; Larned *v.* Tierman, 111, 173; Marston *v.* Humes, 3 Wash. St., 267; City of Hannibal *v.* Marion Co., 69 Mo., 571. See also, the very exhaustive briefs of counsel and note to Lewis *vs.* Dunne, *supra,* 55 L. R. A., 833, where the case upon both sides are collated.

3. The further contention that the statute is unconstitutional because it is not uniform in its operation, and exempts certain persons from its observance, cannot be sustained. The reference made in the statute to jobbers and wholesale dealers doing business with customers outside of the State does not bear the construction which counsel put up on it. The evident purpose of the proviso is to avoid any interference with shipments made from such dealers in the State to p-ints outside of the State, and thus to escape, if possible, any objection to its validity based upon the exclusive control of Congress over interstate commerce. Whether it is effective for the purpose intended we need not consider, and the wisdom of its enactment is a question for the legislature alone. It operates alike upon all persons in like situation, and therefore is of uniform operation within the meaning of the constitution. Iowa R. L. Co. *v.* Soper, 39 Iowa, 112; Iowa R. L. Co. *v.* Schrader, 87 Iowa, 659. Christie *vs.* Life Ins. Co. 82 Iowa 360.

The judgment of the district court is affirmed.

27 In the Supreme Court of Iowa.

C. P. Cook and Ed Plunkett, Appellants,
vs.
Marshall County et al., Appellees. } Decree.

This cause came on to be heard at the October term 1902, upon the printed records and briefs of both parties and upon oral arguments, and the court took the matter under advisement and now this 1st day of June 1903 being one of the days of the May term, the court having considered the arguments and being fully advised in the premises, finds, that the equities are with the appellees; that the taxes levied by the officials of Marshall county under and by virtue of the provisions of section 5007 of the Code are valid, and the same are therefore now fully established, and given full force and effect as provided by law.

It is therefore ordered, adjudged and decreed that the decree of the court below be and it is *offered* as per opinion on file and that judgment be entered against appellants for costs which are by the clerk of this court taxed at the sum of $15.75. To which appellants except.

BISHOP,
Chief Justice.

[Endorsed:] Filed Jun- 26 1903 Jno. C. Crockett clerk supreme court.

28 In the Supreme Court of Iowa.

C. P. COOK and ED. PLUNKETT, Appellants,
vs.
MARSHALL COUNTY, Appellee.
} Petition for Writ of Error.

To the Hon. Charles A. Bishop, chief justice of the supreme court of Iowa:

Now come C. P. Cook and Ed. Plunkett the plaintiffs in error in the above entitled cause by their attorney and say that on the first day of June, 1903, the supreme court of Iowa being the highest court in the State of Iowa in which a decision in the above entitled cause could be had, entered a final decree herein in favor of Marshall County and against the plaintiffs in error in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the plaintiffs in error in that the validity of a certain statute of the State of Iowa constituting section 5007 of the Code of 1897, having been drawn in question by the plaintiffs in error on the ground that said statute is repugnant to division three (3) of section eight (8) of article I of the Constitution of the United States, the decision of this court was in favor of the validity of said statute and against the rights set up under the said clauses of the United States Constitution as aforesaid, and certain unjust penalties provided by said section 5007 of the Code of Iowa were imposed upon these plaintiffs in error.

29 Wherefore said plaintiffs in error, C. P. Cook and Ed. Plunkett pray that a writ of error may issue in this behalf from the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the record, proceedings, and opinion and papers in this case duly authenticated may be sent to the said Supreme Court of the United States and that the said judgment and decree may be re-examined and reversed.

DUNSHEE & DORN,
Attorneys for Plaintiffs in Error.
JUNIUS PARKER, *Of Counsel.*

[Endorsed:] Filed Jun- 29, 1903. Jno. C. Crockett, clerk supreme court.

30 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of Iowa, at the May term 1903 thereof, at Des Moines, Iowa, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between C. P. Cook and Ed. Plunkett, appellants, and Marshall County and others appellees, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said C. P. Cook and Ed. Plunkett, appellants, as aforesaid, as by their complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings with all things concerning the same to the Supreme Court at Washington within thirty days from the date hereof, that, the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according
31 to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of June, in the year of our Lord one thousand nine hundred and three.

[Seal U. S. Circuit Court, Southern District Iowa.]

EDWARD R. MASON,
Clerk U. S. Circuit Court, So. Dist. of Iowa.

STATE OF IOWA, *ss:*

Allowed by—
CHARLES A. BISHOP,
Chief Justice of the Supreme Court of Iowa.

Bond to be $250.

Filed June 29" 1902.

JNO. C. CROCKETT, *Clerk.*

[Endorsed:] Filed Jun- 29 1903 Jno. C. Crockett clerk supreme court.

32 In the Supreme Court of the United States.

C. P. COOK and ED. PLUNKETT, Appellants, vs. MARSHALL COUNTY, Appellee. } Writ of Error to the Supreme Court of Iowa. Assignment of Errors.

The appellants C. P. Cook and Ed. Plunkett come by their attorneys feeling themselves to be aggrieved by the findings and judgment of the supreme court of Iowa in the above entitled cause and assign errors thereto as follows:

I.

That the supreme court of Iowa erred in holding and adjudging that section 5007 of the Code of Iowa under which certain assessments of so called cigarette mulct tax were levied by the taxing officers of Marshall county, Iowa, against appellants, was not in so far as the acts of appellants, by reason of which said taxes were levied are concerned in conflict with section 8 of art. I of the Constitution of the United States, and in affirming the judgment of the district court of Marshall county, Iowa, by which judgment said assessments were established and confirmed.

II.

That the supreme court of Iowa erred in holding and adjudging that section 5007 of the Code of Iowa, under which certain assessments of so called cigarette mulct tax were levied by the taxing officers of Marshall county, Iowa, against appellants, was not in so far as the acts of appellants, by reason of which said taxes were levied, are concerned, in conflict with section 10 of art. I of the Constitution of the United States, and in affirming the judgment of the district court of Marshall county, Iowa, by which judgment said assessments were established and confirmed.

33 III.

That the said supreme court of Iowa erred in holding that the packages of cigarettes sold by C. P. Cook, plaintiff in error were not the original packages in which said cigarettes were imported, and that therefore the sales by said appellant were not an act of interstate commerce subject under sections 8 and 10 of art. I of the Constitution of the United States to congressional regulation only, and not to the regulation and control of any of the States.

IV.

That the supreme court of Iowa erred in holding that section 5007 of the Code of Iowa, being thelaw under which certain assessments of the so called cigarette mulct tax were levied against ap-

pellants by the taxing officers of Marshall county, Iowa, was not in violation of the fourteenth amendment to the Constitution of the United States in its provision that the provisions of said section 5007 shall not apply to the sales of jobbers and wholesalers in doing an interstate business with customers outside of the State of Iowa, in that it denies to appellants the equal protection of the laws, appellants being persons within the jurisdiction of the State of Iowa.

V.

That the supreme court of Iowa erred in holding that said pretended assessments and levies of so called cigarette mulct taxes made under and by virtue of the provisions of section 5007 of the Code of Iowa are valid and enforcible.

VI.

That the validity of the aforesaid statute, section 5007 of the Code of Iowa, having been drawn in question by appellants as applied to the acts for which the said so called taxes were levied against appellants, on the ground that said statute as applied constituted a regulation of interstate commerce and was therefore in contravention of the Constitution of the United States, the supreme
34 court of Iowa erred in that its decision was in favor of the validity of said statute as applied to the sales by appellant, C. P. Cook on the premises of the appellant, Ed. Plunkett, for which sales said pretended assessments were levied, and in holding and adjudging that the same was as so applied not in conflict with the said section of the Constitution of the United States.

VII.

That the validity of the aforesaid statute, section 5007 of the Code of Iowa having been drawn in question by the appellants as applied to the sales made by appellant, C. P. Cook on the real estate of the appellant, Ed. Plunkett, for which said pretended assessments were levied against appellants, on the ground that said statute so applied denies to appellants the equal protection of the laws, appellants being persons within the jurisdiction of the courts of the State of Iowa, and was therefore in contravention of the fourteenth amendment to the Constitution of the United States, the supreme court of Iowa erred in that its decision was in favor of the validity of said statute and in holding and adjudging that the same was and is not in conflict with the said fourteenth amendment to the Constitution of the United States, and that the pretended assessments levied thereunder are valid.

VIII.

And the said C. P. Cook and Ed. Plunkett, pray that the errors so complained of may be corrected and that the judgment of the supreme court of Iowa may be reversed, annulled, and altogether held

for nothing, and that the assessments of the said so called cigarette mulct taxes may be cancelled, set aside, and held for naught, and that plaintiff- in error be restored to all things which *he has* lost by occasion of the said erroneous judgment aforesaid.

JUNIUS PARKER,
DUNSHEE & DORN,
Attorneys for Appellants.

[Endorsed:] Filed Jul- 9 1903 Jno. C. Crockett clerk supreme court.

35 *Bond.*

Know all men by these presents: that we C. P. Cooke and Ed. Plunkett of Marshall county, Iowa, as principals, and John W. Howell of Polk county, Iowa, as surety, are held and firmly bound unto Marshall County in the full and just sum of $250.00 to be paid to the said Marshall County, its certain attorney or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 26th day of June, in the year of our Lord 1903.

Whereas lately at a supreme court of the State of Iowa in a suit pending in said court between C. P. Cooke and Ed. Plunkett as appellants, and Marshall County as appellees a judgment was rendered against the appellants establishing and confirming a certain so called mulct tax levied by the taxing officers of Marshall county, Iowa, and making the same a lien upon certain real estate in said Marshall county, Iowa, and the said C. P. Cooke and Ed. Plunkett having obtained a writ of error and filed a copy thereof in the clerk's office of the said county to reverse the judgment in the aforesaid suit, and a citation directed to the said Marshall County citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof: Now the condition of the above obligations is such that if the said C. P. Cooke and Ed. Plunkett shall prosecute their writ of error to effect and answer all damages and costs if *he* fail to make *his* plea good then the above obligation to be void; else to remain in full force and effect.

C. P. COOK,
ED. PLUNKETT, *Principals,*
By F. S. DUNSHEE &
C. R. DORN, *Att'ys.*
J. W. HOWELL, *Surety.*

36 STATE OF IOWA, } ss:
Polk County, }

I, John W. Howell on oath depose and say that I am the surety above named; that I am worth more than $500.00 over and above my debts and exemptions, and have real property in the State of Iowa worth more than $500.00 outside of my homestead.

J. W. HOWELL.

Subscribed and sworn to before me and in my presence by the said John W. Howell this 29 day of June, 1903.

[Notarial Seal of F. S. Dunshee, Iowa.]

F. S. DUNSHEE,
Notary Public.

[Endorsed:] Filed Jun- 29 1903 Jno. C. Crockett clerk supreme court. Filed and approved this 29th day of June 1903 Jno. C. Crockett clerk supreme court of Iowa.

37 UNITED STATES OF AMERICA, ss:

To the County of Marshall, State of Iowa, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error in the clerk's office of the supreme court of Iowa, wherein C. P. Cook and Ed. Plunkett are plaintiffs in error and you are defendant in error, to show cause, if any, there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles A. Bishop, chief justice of the supreme court of Iowa this 24th day of June in the year of our Lord one thousand nine hundred and three.

CHARLES A. BISHOP,
Chief Justice of the Supreme Court of Iowa.

I acknowledge service of notice of the within and copy of the same has been left with me this 3d day of July, 1903.

F E. NORTHUP,
County Attorney of Marshall County.
F. E. NORTHUP,
Attorneys for Marshall County.

[Endorsed:] Filed Jul- 9, 1903 Jno. C. Crockett clerk supreme court.

38 In the Supreme Court of Iowa.

STATE OF IOWA, ss:

I, Jno. C. Crockett, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true an- correct transcript of the record opinion and final judgment in the case of C. P. Cook and Ed. Plunkett the plaintiff- in error, *vs.* Marshall County Iowa defendant in error, as full, true and complete as the same are of record and on file in my office.

I further certify that the writ of error, citation and supersedeas bond, with the order of approval to operate as a supersedeas endorsed thereon, are hereto attached in original form, and that true and correct copies thereof have been retained in my office, and this return is made in obedience to said writ of error.

In testimony whereof, witness my signature and the seal of said court at Des Moines, Iowa, this 9th day of July A. D. 1903.

Seal of the Supreme Court of Iowa.

JNO. C. CROCKETT,
Clerk Supreme Court.

Endorsed on cover: File No. 19,036. Iowa supreme court. Term No. 385. C. P. Cook and Ed. Plunkett, plaintiffs in error, *vs.* The County of Marshall, State of Iowa. Filed July 31st, 1903.

(19,144.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 493.

R. E. HODGE AND MRS. J. TABOR, PLAINTIFFS IN ERROR,

vs.

MUSCATINE COUNTY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 2, 1904.

1 In the Supreme Court of Iowa, October Term, A. D. 1902.

R. E. HODGE and MRS. J. TABOR, Appellants,
vs.
MUSCATINE COUNTY ET AL., Appellees.

Appeal from Muscatine district court.

Hon. W. F. Brannan, judge.

Dunshee & Dorn, attorneys for appellants. J. Parker, of counsel. Ed. P. Ingham, county attorney, for appellees.

Appellants' Abstract of Record.

On the 15th day of November, 1900, appellants filed in the office of the clerk of the district court of Muscatine county, their

2 *Petition in Equity.*

The plaintiffs allege:

"1st. That plaintiff, Mrs. J. Tabor, is the owner in fee of the following real estate, situated in Muscatine, Muscatine county, Iowa, to-wit:

That on said real estate, which is in the business center of the city of Muscatine, is situated a house suitable and fit for the tobacconist business; that said plaintiff, R. E. Hodge, has rented and leased said real estate to plaintiff R. E. Hodge for the purpose of conducting and operating a tobacconist shop or store therein and thereon, and the said plaintiff has caused to be brought into said store, and has offered for sale at retail a stock of plug and smoking tobacco and cigars which have been bought by said R. E. Hodge from various dealers, and he has also brought into said store and offered for sale and sold cigarettes gotten and procured by him only in the manner and way set out in the next following section of the petition; that said R. E. Hodge has not sold, nor offered for sale, given away, nor offered to give away, bartered nor offered to barter any other tobaccos than those mentioned above, and especially has he not sold, nor offered for sale, given away, nor offered to give away, bartered, nor offered to barter, nor held himself out as offering to sell, give away, or barter any cigarette papers or wrappers, or papers intended to be filled with tobacco for smoking at all, nor cigarettes, except such as are ordered sold and shipped to said R. E. Hodge and sold by him as set out in the next following section hereof; that on said real estate above described there has been no tobacco business carried on except by the said R. E. Hodge.

3 2nd. That said plaintiff R. E. Hodge has since May 1, 1900, offered for sale and sold cigarettes on said real estate above described; that all cigarettes thus sold by him were ordered by him from the American Tobacco Company and the Monopol Tobacco Works, corporations organized under the laws of the State of New Jersey, with no place of business, so far as these plaintiffs are informed and believe, in the State of Iowa; that in a few days after the sending of said order by said R. E. Hodge to said American Tobacco Company and Monopol Tobacco Works (which order was for so many packages of Sweet Caporal, Monopol, Straight Cut and Abdallah cigarettes) the said R. E. Hodge received in his place of business on the said real estate, as above described, the number of packages ordered by him; that the delivery was made to him by an agent of the United States Express Company, a common carrier engaged in transportation of commodities into, within and through the State of Iowa; that these various packages were pasteboard boxes, each containing ten cigarettes, each package having on it the name of the brand, Sweet Caporal, Monopol, Straight Cut or Abdallah, as the case may be, the name, State, internal revenue district and number of the factory where made, and a "Caution notice," as provided by the internal revenue laws of the United States, warning all persons against using said package again; that in addition each package had a revenue stamp so pasted across its end that the revenue stamp would have to be removed before the contents of its package could be extracted, which revenue stamp purported to have been pasted on at the factory; that these various packages were delivered by said Amer-

4 ican Tobacco Company and Monopol Tobacco Works to the said United States Express Company in the city of St. Louis, in the State of Missouri, without box, bale, bag, wrapping or any covering or enclosure or anything in any way attaching said package-, or any of them together, with directions to deliver them to said R. E. Hodge at Muscatine, Muscatine county, Iowa; that the said United States Express Company did deliver said packages to said R. E. Hodge without box, bale, bag, wrapping or any covering or enclosure, or anything in any way connecting said packages, or any of them together; that upon receipt of said packages as aforesaid, and on said real estate above described, said R. E. Hodge put said packages on sale in the exact form in which they were received, and being the original packages received by him from the common carrier as aforesaid, and shipped to him as aforesaid by the American Tobacco Company and Monopol Tobacco Works, residents of New Jersey, as aforesaid, from without the State of Iowa, as hereinbefore alleged, and said R. E. Hodge has sold several of said packages; that as said hereinbefore, said R. E. Hodge has not sold, given away, or bartered, nor offered, nor held himself out as offering to sell, give away, or barter, since the first day of May, 1900, any cigarettes except such as were shipped to and received by him as above set out, nor has he sold, given away, nor bartered,

nor offered to sell, give away, or barter, any cigarette papers or wrappers at all, or permitted the same to be done by others; that said R. E. Hodge does not propose to do any sort of business in tobacco or cigarette papers but that in which he is now engaged, to-wit. the business of selling smoking and plug tobacco and cigars, and of selling cigarettes in the original packages in which imported by said R. E. Hodge from another State; that
5 said real estate has not nor will it be used for the sale of tobacco in any other manner or for the sale of cigarette papers.

3rd. That the legislature of the State of Iowa, at its 1897 session, passed a law which is still in full force and effect in the State of Iowa, being section 5007 of the Code of 1897, in words and figures as follows:

'There shall be assessed a tax of $300.00 per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrappers, or any paper made or prepared for use in making cigarettes, or for the purpose of being filled with tobacco for smoking, are sold or given away, or kept with intent to be sold, bartered or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property, both personal and real, used in connection with the business, and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away same. But the provisions of this section shall not apply to the sale by jobbers and wholesalers in doing an interstate business with customers outside the State.'

That, as will be seen by reference to the mulct liquor tax, whose manner of assessment, collection and distribution, it is expressly provided, shall be adopted in the assessment, collection and distribution of taxes under the cigarette mulct tax law, it becomes
6 the duty of the assessor in the district in which cigarettes are sold, in the month of March, June, September and December of each year, to make an assessment of $75.00 against the person selling and the property in which the said cigarettes are sold, and that said tax shall become due and payable the first of the following month, and that upon a month's default a penalty of 20 per cent. is added, together with an additional penalty of one per cent. for each additional month of default; further, that the county auditor, to whom the assessment is in the first place returned, shall on the last day of December, March, June and September, certify to the county treasurer the list of those delinquent in the payment of said tax, with a description of the properties occupied by them, and said taxes shall thereupon become a lien upon said property; further provision is made for the collection of said tax as all other delinquent taxes are collectible; that is, by distress and sale of the property by the

county treasurer, and by sale of the real estate as provided for in the general statutes regulating the collection of taxes.

4th. That under the laws above set out the defendant assessor is proceeding to make his assessments in said Muscatine district, being urged thereto by the penalty provided in the said act, and also by advice from the county attorney of Muscatine county; that it is the declared purpose of all the defendants to enforce said mulct tax law against every person selling cigarettes and every piece of real estate upon which cigarettes are sold, by making the assessment provided in said law, putting the tax assessed in process of collection, adding penalties for delinquency, and by distress and sale of person-
7 alty and statutory sale of realty to enforce the payment thereof; that said plaintiffs under the terms of the law being liable to the tax, the plaintiff R. E. Hodge for selling cigarettes, and the plaintiff Mrs. J. Tabor as being the owner of real estate whereon cigarettes are sold, it is the declared purpose and intent of said defendants, and all of them as the tax assessing, supervising and collecting officers of Muscatine county, Iowa, to assess and compel the payment of said mulct tax from plaintiffs under the provisions of said mulct tax law. And defendants have assessed mulct taxes against said real estate for the months of May to December, 1900, inclusive, amounting to two hundred forty dollars, and are now proceeding to advertise said real estate for sale at the annual tax sale of Muscatine county to satisfy said mulct tax.

5th. That plaintiffs are advised and believe the said mulct tax law and all its provisions, in so far as they are sought to be enforced against plaintiff because of the sale by plaintiff R. E. Hodge of cigarettes as herein set out, is an attempted regulation of interstate commerce, and is therefore void as in contravention of that clause of the Constitution of the United States which gives to Congress the power to regulate commerce with foreign nations, Indian tribes and between the States. That as plaintiffs are further advised the said mulct tax laws being thus unconstitutional as applied to the business of the said R. E. Hodge carried on on the real estate of the said Mrs. J. Tabor as aforesaid, any tax assessed, levied and attempted to be collected from either of said plaintiffs on account of said business would be illegal and void, and plaintiffs have the right, therefore, to come into a court of equity without application to the board of supervisors for a remission and
8 pray for injunctive relief against any steps being taken to the annoyance and damage to plaintiffs in their business by the attempted and illegal assessment and collection of said tax; that without injunctive relief from the court, plaintiffs will be subject to great and irreparable injury in the attempted assessment and collection of said illegal tax, the attaching a lien to the real estate of said Mrs. J. Tabor and the sale of said real estate as well as the distraint of the personal property of both plaintiffs, and the injury to their legally conducted and constitutionally protected business as aforesaid.

Wherefore, plaintiffs pray that by injunction from this honorable court, the defendants and all of them be perpetually enjoined from assessing, levying or collecting any tax in accordance with the provisions of the mulct tax law hereinbefore set out against either of the plaintiffs, or against the property described herein, and be enjoined from taking any step looking to said assessment, levy or collection, or tax sale, and that a temporary injunction issue restraining such acts until this cause shall be finally heard, and that plaintiffs have such other and further relief as may be deemed equitable in the permises."

(Duly verified.)

The petition was presented to the court and temporary injunction issued.

Thereupon appellees filed the following

9 *Demurrer to Petition.*

"The defendants by their counsel demur to the petition of the plaintiffs for reason- as follows:

1. The facts stated in the petition do not entitle the plaintiffs to the relief demanded, nor to any relief. And without waiving any matter or thing that may be urged under the general demurrer so as above stated, the defendants specifically show hereunder, as follows:

(*a.*) It appears from the petition that R. E. Hodge, a citizen and resident of the State of Iowa, is engaged in selling and keeping with intent to sell within said State, cigarettes, in violation of the provisions of sections 5006 and 5007 of the Code; and it does not appear that said sales and proposed and intended sales by him are with customers outside of the State, nor do such sales constitute interstate commercial transactions.

(*b.*) The petition confesses purely domestic sales of cigarettes by one citizen of the State to other citizens of the State, his customers, the same as any other of his stock in trade. With these and such transactions, the interstate commercial laws have nothing to do, nor does Congress have constitutional authority nor assume to regulate them.

(*c.*) The importation of cigarettes into Iowa by the corporation tobacco companies and their delivery to R. E. Hodge in this State as a part of his store stock, ended the matter as an interstate commercial transaction; the goods in question thereupon became
10 a part of plaintiff's stock for his domestic trade, and his subsequent sales and keeping for sale rendered him and the property occupied by him, liable to the mulct tax enjoined herein.

(*d.*) It is only a sale and shipment by a citizen of one State to a citizen of another that is in the purview of the interstate commerce laws, and the constitutional provisions relating to them.

(e.) The packages in which, as it appears from the petition, the cigarettes were received by the plaintiff, were not original packages in the sense and meaning of the law, but were a mere subterfuge to enable the said plaintiff, R. E. Hodge, to retail, in violation of the police laws of Iowa, a commodity decided by the legislature and shown by experience to be detrimental to health and good morals.

2. There is no equity in the bill, nor is it sufficiently alleged that there is. It does not appear but that the plaintiffs have a complete and adequate remedy at law; and the only object of the bill is to defeat the State of a tax authorized by the legislature, upon domestic sales of a prohibited article of domestic commerce."

Thereupon appellants filed the following

* * * * * * *

11 Thereafter on the — day of July, 1901, by leave of court appellants filed the following:

12 *Second Amendment to Petition.*

"Division one."

"Come now the petitioners and for further amendment to their petition show to the court that said section 5007 of the Code in so far as it provides that it shall not apply to the sales of jobbers and wholesalers in doing an interstate business with customers outside the State is in violation of the fourteenth amendment of the Constitution of the United States in that it denies to your petitioners equal protection of the law, and your petitioners are persons within the jurisdiction of the State of Iowa. And in said provision said section 5007 is in violation of the 6th section of article 1 of the constitution of Iowa which provides that all laws of general nature shall have a uniform operation. That said law is therefore invalid and said pretended assessment null and void.

Division two.

Par. 1. And your petitioner, Mrs. J. Tabor, states further that she had no knowledge whatever that the real estate described in the petition was being used for the sale of cigarettes or cigarette paper until after said assessment was levied and never consented to the same; that petitioner resides in Illinois and that the said real estate was in charge of one J. H. Monroe, as agent who had full authority to look after, control and rent the same and had no authority to rent the same for any unlawful business and did in fact rent the same to R. E. Hodge, the co-plaintiff herein by written lease providing in express terms that the premises should not be used for any

13 unlawful purposes whatever, and neither this petitioner nor said agent, J. H. Monroe, had any knowledge or notice of

any kind that said premises were being used for the sale of cigarettes or cigarette paper. And your petitioner further states that she forthwith put a stop to the sale of cigarettes as soon as the same was brought to her attention. And since that time no sales have to her knowledge been made upon said premises either in the original package or in any other form.

Par. 2. And said petitioner further states that section 5007 in so far as it authorizes the levy of a tax against her property by reason of the unlawful sale of cigarettes thereon by other persons, without her knowledge and consent is wholly null and void and in contravention of the Constitution of the United States and the constitution of the State of Iowa, in that it authorizes the taking of her property without due process of law, in that said section 5007 does not provide for any notice to this petitioner and authorizes an assessment against her property even though she be absolutely innocent of the offense of dealing in cigarettes or cigarette paper. Wherefore your petitioners pray as heretofore and Mrs. J. Tabor particularly prays that said tax be decreed null and void so far as the same is a lien upon her real estate, and that the same may be cancelled and annulled and that she have judgment for her costs."

(Duly verified.)

Thereafter appellants by leave of court filed the following:

* * * * * * *

14 Whereupon appellants filed the following:

Demurrer to the Amendments to Petition.

"The defendants, by their counsel, demur to the amendments of plaintiffs' petition and to each of them, for reason- as follows:

1. The facts stated in their amendments do not entitle plaintiffs to relief demanded, nor to any relief. And without waiving any matter or thing that may be urged under the general demurrer so as above stated, the defendants specifically show hereunder, as follows:

(*a.*) It appears that sections 5006 and 5007 were enacted as part of the general codification of the laws of Iowa, as effected by the extra session of the Twenty-sixth General Assembly. Considering the sections together, and as they were enacted, it is plainly evident the legislature was treating the sale of cigarettes as a crime (see section 5006). Therefore the title of the act is a proper one.

15 (*b.*) Section 5007 only provides an additional penalty for the violation of section 5006.

(*c.*) The so-called tax provided for in section 5007 is not a tax for revenue; nor is the section enacted as a part of the general revenue laws of the State; and the section 7, article 7 of the constitution quoted, in no way applies to said section.

(*d.*) It is plain that the law (section 5007) does distinctly state the tax. It shall be $300 and its object is apparent from the law itself; and it does not 'refer to any other law to fix such tax or object.' The reference to another law is merely as to how said tax shall be 'assessed, collected and distributed.'

(*e.*) If properly called a tax, it is an occupation charge and not a property tax, and the laws relating to general taxes have no application.

2. There is no equity in the bill or the amendments thereto, nor is it sufficiently alleged there is. It does not appear but that the plaintiffs have a complete and adequate remedy at law; and the only object of the bill is to defeat the State of a tax or charge authorized by the legislature and under its police laws, upon the domestic sales of a prohibited article of domestic commerce."

And said demurrers were duly submitted and sustained, and the following

16 *Judgment Entry*

made of record.

"In this cause the demurrer of defendants to plaintiffs' petition and amendments thereto having been sustained by the court, to which ruling plaintiffs excepted at the time, and now plaintiffs electing to stand on their petition and amendments thereto and refusing to plead or proceed further with the trial of this cause;

"It is therefore ordered and adjudged that the defendants have and recover of and from the plaintiffs their costs in this suit taxed at $— and that execution issue therefor. To which judgment and ruling of court plaintiffs except."

And on the — day of February, 1901, the appellants perfected an appeal to the supreme court of the State of Iowa by serving notices of appeal upon the appellees and upon the clerk of the district court of Muscatine county and by securing the clerk for his transcript fees.

The foregoing abstract is full, true and correct, and contains all the pleadings in said action, all the exceptions, all the rulings and everything which is of record in said cause and all things referred to herein are of record in said court and cause.

DUNSHEE & DORN,
Attorneys for Appellants.
J. PARKER, *Of Counsel.*

We hereby certify that the cost of printing this abstract is $15.30.

DUNSHEE & DORN,
Attorneys for Appellants.

17 & 18 *Bond.*

Know all men by these presents: That we R. E. Hodge and Mrs. J. Tabor, as principals, and J. W. Howell, as sureties, are held and firmly bound unto Muscatine County in the full and just sum of two hundred and fifty dollars, to be paid to the said Muscatine County, its attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, our executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of November, in the year of our Lord one thousand nine hundred and three.

Whereas lately at a supreme court of the State of Iowa, in a suit pending in said court between R. E. Hodge and Mrs. J. Tabor, appellants, and Muscatine County, *et al.*, appellees, a judgment was rendered against the said R. E. Hodge and Mrs. J. Tabor, appellants, establishing and confirming certain so called cigarette mulct taxes against said appellants together with the costs of the cause, and the said R. E. Hodge and Mrs. J. Tabor having obtained a writ of error and filed a copy thereof in the office of the clerk of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said County of Muscatine citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now the condition of the above obligation is such that if the said R. E. Hodge and Mrs. J. Tabor shall prosecute their writ of
19 error to effect and answer all damages and costs if they fail to make their plea good then the above obligation to be void; else to remain in full force and virtue.

R. E. HODGE,
MRS. J. TABOR,
By DUNSHEE & DORN, *Attorneys.*
J. W. HOWELL.

Approved by
CHARLES A. BISHOP,
Chief Justice of the Supreme Court of Iowa.

20 STATE OF IOWA, } *ss:*
Polk County, }

I, J. W. Howell, on oath depose and say that I am the surety above named; that I am worth more than $500.00 over and above my debts and exemptions, and have real property in the State of Iowa worth more than $500.00 outside of my homestead.

J. W. HOWELL.

Subscribed and sworn to before me and in my presence by the said J. W. Howell this 10 day of November, 1903.

[Notarial Seal, F. S. Dunshee, Iowa.]

F. S. DUNSHEE,
Notary Public.

21 [Endorsed:] 7 No. 22367. Law Equity Probate Supreme court of Iowa, —— county Hodge *vs.* Muscatine Co. Bond. Copy fee, $—. Filed Nov, 14 1903 Jno. C. Crockett, clerk supreme court. Dunshee & Dorn attorneys Des Moines, Iowa.

22 In the Supreme Court of Iowa.

R. E. HODGE and MRS. J. TABOR, Appellants,
vs.
MUSCATINE COUNTY ET AL., Appellees.
} Appeal from Muscatine District Court.

Hon. W. F. Brannan, judge.

Decree.

This case was duly submitted to this court at the May term thereof and taken under advisement and on the 22nd day of October, 1903, being one of the days of the October term of said court, a decision was handed down confirming the decree of the district court of Muscatine county, and appellants having waived time for filing motion for re-hearing, and having elected to stand on said decision, it is therefore ordered, adjudged and decreed, that the action of the said district court of Muscatine county be and is hereby affirmed; that the assessments complained of be and are hereby established and confirmed, and that judgment be rendered against appellants for costs; to all of which appellants except.

CHARLES A. BISHOP,
Chief Justice.

23 [Endorsed:] 7 No. 22367 Law Equity Probate Supreme court of Iowa —— county R. E. Hodge *vs.* Muscatine Co. *et al.* Decree Entered R. 24, 511 Copy fee $— Filed Nov. 14 1903 Jno. C. Crockett clerk supreme court. Dunshee & Dorn attorneys Des Moines, Iowa

24 UNITED STATES OF AMERICA, ss:

To the County of Muscatine, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the

clerk's office of the supreme court of Iowa, wherein R. E. Hodge and Mrs. J. Tabor are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants, as in the writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles A. Bishop, chief justice of the supreme court of Iowa, this 13 day of November, in the year of our Lord, one thousand nine hundred and three.

CHARLES A. BISHOP,
Chief Justice of the Supreme Court of Iowa.

I acknowledge service of notice of the within, and copy of the same has been left with me this 14" day of November, 1903.

ED. P. INGHAM,
Attorney for Muscatine County.

25 [Endorsed:] No.— Law Equity Probate District court of Iowa —— county —— —— *vs.* —— ——. Copy fee $— Dunshee & Dorn attorneys Des Moines, Iowa.

26 In the Supreme Court of Iowa.

Filed Oct. 22nd, 1903.

R. E. HODGE and MRS. J. TABOR, Appellants,
vs.
MUSCATINE COUNTY ET AL., Appellees.

Appeal from Muscatine County district court.

Hon. W. F. Brannan, judge.

Suit in equity to enjoin defendants from assessing, levying, or collecting a cigarette mulct tax upon the property of plaintiff Tabor, which was used by plaintiff Hodge for the purpose of retailing tobacco and cigars, on the ground that the provisions of the "mulct law" authorizing such tax is unconstitutional and void as applied to the owner of property which has been leased to another.

The trial court dismissed plaintiffs' petition and they appeal.

Dunshee & Dorn, (J. Parker, of counsel) for appellants.
No appearance for the appellees.

DEEMER, *J.:*

As the case involves the constitutionality of certain statutes it seems necessary although they are familiar to the profession to set some of them out *in extenso.* Section 5006 of the Code forbids in

general terms the manufacture, sale, exchange, or disposition of cigarettes, or cigarette paper.

27 Sec. 5007 reads as follows:

"Tax on sale.—There shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarettes wrapper, or any paper made or prepared for the use in making cigarettes, or for the purpose of being filled with tobacco for smoking, are sold or given away, or kept with the intent to be sold, bartered or given away under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property, both personal and real, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes, or cigarettes paper or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the State."

The sections referred to in section 5007, relating to the "assessment collection and distribution" of the taxes provided for therein are in substance (before amendment by the Twenty Ninth General Assembly) as follows:

SECTION 2433. In the months of December, March June and September of each year and before the twentieth day of each of said months the assessor shall return to the auditor a list of persons liable to the tax and a description of the real property whereon the business has been carried on.

SEC. 2436. On the first day of January, April, July & October of each year there shall be due and payable from each person so returned to the county auditor a quarterly installment of the mulct tax herein provided for, which shall be a lien upon the real property wherein such business is returned as being carried on, whether the person carrying on such a business or maintaining such place

28 is correctly described or not. If such installment is not paid within one month after it becomes due and payable, a penalty of 20 per cent., attaches together with 1 per cent. per month thereafter until it is paid. The person so assessed is liable for at least one quarterly installment whether he quits the business or not.

SEC. 2437. On the last day of December March, June, and September of each year the county auditor shall certify to the county treasurer a complete list of the names returned to him by the assessor, with a description of the real estate and the names of the occupant, and the owner or agent of such property.

SEC. 2438. The county treasurer shall thereupon enter upon *teh* book known as the mulct tax book a quarterly installment of the mulct tax as due and payable by the person carrying on such business as

a lien and charge upon and against the real property wherein or whereon such business is carried upon.

SEC. 2439. After the expiration of one month from the date of when such tax becomes due if not paid it shall be delinquent and collectable by the treasurer in the same method as that in which other delinquent taxes are collectable and all the provisions as to collection of other delinquent taxes shall apply. Tax sales for said delinquent taxes shall also be made on the first Monday of June in each year.

SECTION 2440. At any time after a quarterly installment of such taxes becomes delinquent, the treasurer may collect the same by seizing and selling any personal property used in connection with the business or in maintaining the place."

These are all the provisions of the mulct liquor law with reference to the assessment and collection of the liquor mulct tax. The following provisions of the liquor law with reference to the remission of taxes assessed erroneously are claimed to be applicable to the cigarette business and in view of such claim we give an abstract of such provisions.

SEC. 2441. "At the meeting of the board of supervisors next following, the listing as aforesaid, application may be made to the board to remit the tax by petition duly verified and filed with the county auditor at least eight days before the time set for the consideration of the case, and notice for the same length of time
29 must be served on the county attorney in writing. The averments of the petition shall be deemed denied and witnesses may be examined oath being administered by the chairman of the board with the same effect as to penalties for testifying falsely as if administered in court.

SEC. 2442. The owner of the property may be heard in support of his application and evidence of the general reputation of the place shall be admissable. If it be found by a majority vote of the board that the tax is proper it shall stand; otherwise it shall be remitted. Eeither the petitioner or the county attorney may appeal to the district court and if the petitioner appeals he shall be required to give bond for costs accrued and to accrue, whereupon the auditor shall file a transdript in the office of the clerk.

SEC. 2444. On appeal the trial shall be conducted as a- equitable cause."

Appellants contend that section 5007 is void because it deprives or may deprive citizens of their property without due process of law in that:—(1) That law contains no provision for notice to either dealer or real estate owner. (2) The charge imposed by section 5007 is in the nature of a criminal penalty and the measures provided for its enforcement and collection are not adapted to the ends sought. (3) The attempt to enforce a criminal penalty through the taxing machinery of the State is revolutionary and contrary to the established principles of justice. (4) The principles embodied in the law in question are arbitrary unusual and unknown to "the

law of the land" as that term is used and intended in all constitutions. The petition also challenged the act because it was an attempt to regulate interstate commerce and therefore void. This point is not insisted upon for the reason we suppose that under a substantially similar state of facts it was held in Cook *vs.* Marshall County, 93 N. W. R., 372, that there was no merit in the contention. That case also holds the act in question was properly entitled and that it is uniform in its operation.

The objections now made to the enactment as stated by counsel in the quotation made from their brief, nearly all revolve around the central thought that it amounts to taking of plaintiffs' property without due process of law and in contrary to the law of the land.

30 Incidental to this is the claim th-t sections 2441–2442 and 2444 do not apply to the case. This is bottomed on the notion that sec. 5007 does not refer to those sections either in terms or by necessary implication. The reference to the mulct liquor tax law is as follows: Such tax * * * shall be assessed, collected and distributed in the same manner as the mulct liquor tax." Sections 2441 *et seq.* are found in this mulct liquor tax law and it seems to us they refer to the assessment and collection of that tax. They are a part of the proceedings with reference to the assessment and collection of the mulct tax and are as much a part of the proceedings as if written out at length in section 5007 before quoted. A section which relates to the remission or revocation of the tax when embodied in the act authorizing its assessment and evidently forming one of the inducements to the passage of the act is as much a part of the law relating to the assessment and collection of the tax as that part expressly authorizing the levy and collection thereof.

And in determining the constitutionality of a statute imposing a tax, it would be unjust and unreasonable to divorce it from other provisions of the same law which gave to the person against whom the tax is to be assessed and from whom the tax is to be collected, a remedy for avoiding that tax.

The whole act relating to this subject and germane to the purposes and objects thereof should be considered in arriving at its constitutionality. These sections of the mulct liquor tax law relating to what may be called the remission of the tax really relate to its enforcement or assessment and should be considered in determining the constitutionality of sec. 5007 with this conclusion in mind we now go to the points made by counsel against the validity of the law.

31 It differs from the liquor mulct tax in that the payment thereof does constitute a bar to prosecutions under section 5006 which absolutely prohibits the sale of cigarettes.

In this it is peculiar and this peculiarity constitutes the basis of the attack made upon it.

The tax imposed by the mulct liquor law has been held to be a

charge or license exacted for the privilege of carrying on the business of vending liquors.

Smith *vs.* Scow, 66 N. W., 893.

And *In re* Smith 104 Ia. 199, it is held that as the tax is assessed and levied by virtue of a general law upon all premises and persons which came within the provisions of the act, the persons liable to the same must appear and pay the same without notice. In the opinion it is said "No notice to the lot owner of the assessment and levy was necessary. * * * There was no more necessity for notice to the property owner than in cases of taxes generally."

In Ferry *vs.* Deneen, 82 N. W. R. 424, it is said: "It is apparent taking all the provisions of this act together that the amount imposed while called a tax is at the same time a penalty. We do not think all the rules governing ordinary taxes should control here. * * * The levy is made by the law * * * and as used in the act means scarcely anything more than a formal approval."

As to the vender of either cigarettes or liquors no notice of the assessment or levy of the tax is necessary. The tax is specific and operates alike upon all who engage in the business. The amount is fixed and there is nothing left to inquire into and determine.

Ferry *vs.* Campbell, 110 Ia. 294.

Gatch *vs.* Des Moines, 63 Ia. 718.

But it is contended that the owner of property who is not directly engaged in the unlawful business is entitled to notice and opportunity to be heard before a tax may be legally levied against his property and that as the law does not require such notice it is invalid.

32 In order to solve this question it is necessary to investigate a little more closely into the nature of the tax imposed by section 5007. It is clearly not a license for it does not grant permission to do an act which without such permission would be invalid.

State *vs.* Hipp, 38 Ohio St. 206.

Chilvers *vs.* People, 11 Mich. 43.

It is manifestly a tax upon the traffic which the legislature saw fit to impose not for the purpose of giving countenance to the business but as a deterrent against engaging therein. It confers no right but imposes an impediment to the transaction of the business. It is clearly a tax on that business levied to meet the burdens imposed upon the general public by what is thought to be the result upon the human race and particularly upon children of the use of cigarettes.

Indemnity and protection to the public against evils resulting from the nature and character of the business is the central thought. It also partakes of the nature of a police regulation but it is not to be wholly so regarded.

Indeed we think it may be fairly said to be a tax upon the business. That a tax is imposed for the double purpose of regulation and revenue is no reason for declaiming it, invalid.

2 Dusty on Taxation, 1384.

Being a tax it was competent for the legislature to prescribe the proceedings and processes for its collection.

From the beginning the people of this country have collected taxes through administrative officers, and there has been no suggestion that ordinary judicial processes were necessary to meet the constitutional guaranty of "due process of law."

Cooley on Taxation, 49.

Power of taxation is inherent in sovereignty and this power it has been said "in its nature acknowledges no boundary." As said by the great chief justice in McCulloch *vs.* Maryland 4 Wheat. 428. "The only security against the abuse of the power is found in the structure of the Government itself.

In imposing a tax the legislature acts upon its constituents.
33 This is in general a sufficient security against erroneous and oppressive taxation."

The term "due process of law" is often mis-apprehended or misapplied. Indeed it seems impossible to give a definition which is at once perspicuous and satisfactory.

When applied to taxation regard must be had of the nature of the power. As said in Hagar *vs.* Reclamation Dist. 4. S. C. R. 663 "The power of taxation possessed by the State may be exercised upon any subject within its jurisdiction and to any extent not prohibited by the Constitution of the United States. It may touch property in every shape * * * and the amount of the taxation may be determined by the value of the property, or its use or productiveness. It may touch business in the almost infinite forms in which it is conducted * * * unless restrained by provisions of the Federal Constitution. The power of the State as to the mode form and extent of taxation is unlimited, where the subjects to which it applies are within its jurisdiction."

Following this principle it has been held that a statute of the State of Michigan, authorizing the treasurer to levy by distress and sell any goods or chattels found in the possession of the tax debtor, and that no claim of property made thereto by any other person should be available to prevent the sale was valid.

Sears *vs.* Cottrell, 5 Mich. 251, see also
Sheldon *vs.* Van Buskirk, 2 N. Y. 473.

We need not go to this extent in the case now before us although we have recognized the principle as applied to inn-keepers, liens in Brown Bros. *vs.* Hunt, 103 Iowa 586.

On the authority of the Supreme Court of the United States we do hold that as to the person actually engaged in the business it is not

necessary that he be present, or that he have an opportunity to be present when the assessment is made.

McMillan *vs.* Anderson, 95 U. S. 37.
State R. R. Tax cases 92 U. S. 575.

As to the owner of the property, if any notice or opportunity to be heard be necessary it is sufficient if he be given an opportunity for contesting the charge in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case.

34 Davidson *vs.* New Orleans, 96 U. S. 97.

The Supreme Court of the United States has uniformly adhered to the doctrine that a tax law which provides for a board of revision authorized to hear complaints respecting the justice of an assessment, and prescribes the time during which and the place where such complaints may be made meets all constitutional requirements.

Palmer *vs.* McMahon 10 S. C. R. 327 and cases cited.
Glidden *vs.* Harrington, 23 S. C. R. 574, [61 N. E. 54],* which sustains a similar provision to the act in question.
See also Towns *vs.* Klamanth Co. 53 Pac. Rep. 604.
Paulsen *vs.* Portland, 149 U. S. 30.

We have heretofore given our adherence to this doctrine. In Trustees of Griswold College *vs* City 65 Iowa 634, we said " It seems to be agreed therefore that property taken for the non-payment of taxes is not taken without due process of law, if the tax payer is afforded an opportunity to be heard in relation to the tax, though it be only before the officers clothed with power to assess.

See also Yeomans *vs.* Riddle, 84 Iowa 147.

Indeed the rule seems to be elementary.

Board *vs.* R. R. Co. 48 N. J. L. 146.
Lent *vs.* Tillson, 72 Cal. 404.
Spencer *vs.* Merchant, 100 N. Y. 585.

An act very similar to the one in question was sustained by the supreme court of Ohio in Adler *vs.* Whitbeck 9 N. E. 672.

We are constrained to hold that secs. 2411 *et seq.*, save the act from the claim of unconstitutionality because of want of notice and opportunity to be heard. The regular meetings of the board are fixed by law, and of these all persons must take notice.

What we have said and the authorities already cited answer most of the other contentions made by appellants. There is no requirement of law that such taxes must be collected through judicial proceedings. They may be enforced through summary processes

[* Letters and figures enclosed in brackets in pencil in copy.]

such as distraint or tax sale. This is well established by the cases already cited. The two cases relied upon by appellant McBride *vs.* Adams, 12 So. Rep. 699, and Chauvin *vs.* Valiton, 3 L. R. A. 196 are not in point. The first involved a law imposing a fine or penalty for doing an illegal act, which was to be assessed and
35 collected as a tax. This was held invalid because not due process of law. In the second the legislature of Montana undertook to make a license a lien on property, and to provide for the collection thereof by summary process. This was held invalid because of want of notice or opportunity to be heard. In that case the owner of the property was not given an opportunity to contest the charge.

The unreasonableness of the act is not a matter for our consideration. There is nothing arbitrary in a statute which provides for the collection of a tax by summary process. Such proceedings are necessary to secure prompt payment. They existed long before the constitution was formed, and are in accord with the law of the land.

The trial court was right in sustaining the demurrer to the petition, and its judgment is affirmed.

Affirmed.

36 In the Supreme Court of Iowa.

R. E. HODGE and MRS. J. TABOR, Appellants,
vs.
MUSCATINE COUNTY and THE TAXING Officers of Muscatine Co., Appellees.
} Petition for Writ of Error.

To the Hon. Charles A. Bishop, chief justice of the supreme court of Iowa:

Now, come R. E. Hodge and Mrs. J. Tabor appellants in the above entitled cause by their attorneys and say that on the 22 day of October, 1903, the supreme court of Iowa, being the highest court in the State of Iowa in which a decision in the above entitled cause could be had, entered a final judgment herein in favor of the State of Iowa and against the appellants, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of the plaintiff-in error, in that the validity of a certain statute of the State of Iowa, constituting section 5007 of the Code of 1897, having been drawn in question by the appellants, on the ground that the same is repugnant to the 14th amendment to the Constitution of the United States and to the 3rd sub-division of section 8 of article 1 of the Constitution of the United States, the decision of this court was in favor of the validity of the said statutes and against the rights set up under the said clause of the United States Constitution, as aforesaid, and these appellants were by said decision made liable to certain unjust penalties levied against their

property under and by virtue of the terms of said invalid
37 section 5007.

Wherefore the said appellants, R. E. Hodge and Mrs. J. Tabor, pray that a writ of error may issue in this behalf from the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the records, proceedings, opinion, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States, and that the said judgment and decree may be re-examined and reversed.

DUNSHEE & DORN,
Attorneys for Appellants.
JUNIUS PARKER, *Of Counsel.*

38 [Endorsed:] 7 No. 22367 Law Equity Probate Supreme court of Iowa —— county R. E. Hodge *vs.* Muscatine Co. Petition for writ of error Copy fee $— Filed Nov. 14 1903 Jno. C. Crockett clerk supreme court. Dunshee & Dorn attorneys Des Moines, Iowa

39 In the Supreme Court of the United States.

R. E. DODGE and MRS. J. TABOR, Plaintiffs in Error, *vs.* MUSCATINE COUNTY and THE TAXING Officers of Muscatine County, Defendants in Error.	Writ of Error to the Supreme Court of Iowa. Assignment of Errors.

The plaintiffs in error, R. E. Hodge and Mrs. J. Tabor, come, by their attorneys, feeling themselves to be aggrieved by the findings and judgment of the supreme court of Iowa in the above-entitled cause and assign errors thereto, as follows:

I.

That the supreme court of Iowa erred in holding and adjudging that the statute passed by the General Assembly of the State of Iowa, and constituting section 5007 of the Code of Iowa, under which certain so-called cigarette mulct taxes were levied against the plaintiffs in error by the taxing officers of Muscatine county, and against certain real estate of the said Mrs. J. Tabor, in so far as the act- of plaintiffs in error for which said so called cigarette mulct taxes were levied are concerned, is not in conflict with section 8 of article I of the Constitution of the United States, and in adjudging that said so called cigarette mulct taxes levied under said section 5007 are valid and a lien upon plaintiff's real estate.

40 II.

That the supreme court of Iowa erred in holding and adjudging that the statute passed by the General Assembly of the State of Iowa,

and constituting section 5007 of the Code of Iowa, under which said so called cigarette mulct taxes were assessed by the taxing officers of Muscatine county against the plaintiffs in error and made a lien upon the real estate of plaintiff in error, Mrs. J. Tabor, is not in so far as the acts of the plaintiffs in error, for which said so called cigarette mulct taxes were levied are concerned, in conflict with section 10 of article 1 of the Constitution of the United States, and said supreme court erred in adjudging that the said so called cigarette mulct taxes are valid and are a valid lien upon the real estate of the said Mrs. J. Tabor.

III.

That the supreme court of Iowa erred in holding and adjudging that cigarette packages manufactured for retail trade, for the sale of which the said so-called cigarette mulct taxes were levied against plaintiffs in error, are not legitimate articles of interstate commerce and are, therefore, not under the protection of section 8 or section 10 of article 1 of the Constitution of the United States and that the regulation of commerce in said articles is, therefore, not within the power of Congress under said section of the Constitution of the United States, as aforesaid, but is under the power of the various States, and that therefore the so called cigarette mulct taxes were properly levied under the terms of section 5007 of the Code of Iowa, although plaintiff in error, R. E. Hodge, had imported said cigarettes from another State and sold them in the original package in which they were imported.

41

IV.

That the said supreme court of Iowa erred in holding that the package sold by plaintiff in error, R. E. Hodge, was not an original package in which imported and that therefore the sale by plaintiff in error was not an act of interstate commerce, subject under sections 8 and 10 of article 1 of the Constitution of the United States to only congressional regulation and not subject to the control of any of the States.

V.

That the validity of the aforesaid statute passed by the General Assembly of the United States in the year 1897 having been drawn in question by the plaintiffs in error so far as the same applies to the acts for which certain so called cigarette mulct taxes were levied against plaintiffs in error on the ground that said statute so applied constituted a regulation of interstate commerce, and is therefore in contravention of the Constitution of the United States, the supreme court of Iowa erred in that its decision was in favor of the validity of said statute as applied to the sales of the plaintiff in error, R. E. Hodge, for which said so called cigarette mulct taxes were levied and in holding and adjudging that said section was as so applied

not in conflict with the said section of the Constitution of the United States.

VI.

That the said supreme court of Iowa erred in holding and adjudging that the statute passed by the General Assembly of the State of Iowa and constituting section 5007 of the Code of Iowa, under which so called cigarette mulct taxes were levied by the taxing officers of Muscatine county, Iowa, against plaintiffs in error is not in so far as the acts of plaintiffs in error for which said so called cigarette mulct taxes were levied are concerned in conflict with section 1 of
42 the 14th amendment to the Constitution of the United States, and in adjudging that said cigarette mulct taxes are valid and a valid lien against the real estate of the plaintiff in error, Mrs. R. E. Hodge.

VII.

That the said supreme court of Iowa erred in holding that the said section 5007 of the Code of Iowa as applied to the acts of plaintiffs in error for which said cigarette mulct taxes were levied does not deny to plaintiffs in error equal protection of the law, plaintiffs in error being persons within the jurisdiction of the State of Iowa, and in holding that said section 5007 in that the same does not deny to plaintiffs in error equal protection of the law is not in violation of section 1 of the 14th amendment to the Constitution of the United States.

VIII.

That the said supreme court of Iowa erred in holding that said section 5007 of the Code of Iowa under which said so called cigarette mulct taxes were levied does not authorize the taking of property without due process of law, and in holding that said so called cigarette mulct taxes levied by the taxing authorities of Muscatine county are not a taking of the property of the said R. E. Hodge and Mrs. J. Tabor without due process of law, and that therefore the said section 5007 is not in contravention of section 1 of the 14th amendment to the Constitution of the United States.

IX.

That the said supreme court of Iowa erred in holding that the said section 5007 of the Code of Iowa and the sections of the code therein referred to, to-wit: sections 2433, 2436, 2437, 2438, 2439, 2440, 2441, 2442 and 2444 in so far as said sections authorized the levy of the so called cigarette mulct taxes against the plaintiffs in error and against the real property of the plaintiff in error,
43 Mrs. J. Tabor, through the taxing officers of Muscatine county and without trial by jury and without notice to either

plaintiff in error and without any judicial proceeding are due process of law and are not in contravention of section 1 of the 14th amendment to the Constitution of the United States.

X.

That the said supreme court of Iowa erred in holding that the so called cigeratte mulct taxes levied against plaintiffs in error under and by virtue of the provisions of the said section 5007 of the Code of Iowa are a tax and not a penalty, and that the same were properly levied and assessed by the taxing officers of Muscatine county under the power of taxation, and therefore that the same were not in violation of the provisions of section 1 of the 14th amendment to the Constitution of the United States.

XI.

That the said supreme court of Iowa erred in holding that the said so called cigarette mulct tax levied under the provisions of the said section 5007 of the Code of Iowa is a tax and not a criminal penalty, and in holding that said so called cigarette mulct tax not being a criminal penalty is enforcible by the taxing officers of Muscatine county and not by the judiciary of said county and in denying to these plaintiffs in error, who are citizens of the United States, a trial in accordance with the forms of procedure guaranteed them by the law of the land, and in holding that for said reasons the said section 5007, and other sections referred to therein, are not in contravention of section 1 of the 14th amendment to the Constitution of the United States.

44 XII.

And the validity of the aforesaid section 5007 of the Code of Iowa and the sections referred to therein passed by the General Assembly of the State of Iowa having been drawn in question by the plaintiffs in error so far as the same applied to the acts of plaintiffs for which so called cigarette mulct taxes were levied on the ground that the said statute so applied permits an encroachment of the legislative upon the judicial department of the Government, and denies to plaintiffs in error a trial by the judicial department of the State of Iowa in accordance with the established forms of the law of the land, the supreme court of Iowa erred in that its decision was in favor of the validity of the said section 5007 and the other sections referred to therein as applied to the sales by the plaintiffs in error, for which sales the said so called cigarette mulct taxes were levied, and in holding and adjudging that the same was as so applied not in conflict with the first section of the 14th amendment to the Constitution of the United States.

XIII.

That the validity of the aforesaid statute passed by the General Assembly of the State of Iowa as aforesaid having been drawn in question by the plaintiffs in error, as applied to the acts for which said so called cigarette mulct taxes were levied against plaintiffs in error and against the real estate of the said Mrs. J. Tabor on the ground that said statute so applied provides for a procedure which is unreasonable, arbitrary, unusual and unknown to the law of the land as that term was intended in the constitutions of this country and is therefore in contravention to the Constitution of the United States, the supreme court of Iowa erred in that its decision
45 was in favor of the validity of the said statute as applied to the sales of the plaintiff, R. E. Hodge, for which so called cigarette mulct taxes were levied and adjudging that the same was as so applied not in conflict with the said section of the Constitution of the United States.

XIV.

And the said R. E. Hodge and Mrs. J. Tabor pray that the errors so complained of may be corrected and that the judgment of the supreme court of Iowa may be reversed, annulled and altogether held for nothing; and that the said so called cigarette mulct taxes may be adjudged to be null and void and of no effect and that plaintiffs in error be restored to all things which they have lost by *action* of the said erroneous judgment aforesaid.

DUNSHEE & DORN,
JUNIUS PARKER,
Attorneys for Plaintiffs in Error.

46 [Endorsed:] No.— Law Equity Probate District court of Iowa —— county —— —— *vs.* —— —— Copy fee $— Dunshee & Dorn attorneys Des Moines, Iowa.

47 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of a plea which is in the said supreme court of Iowa, at the October term 1903 thereof, at Des Moines, Iowa, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between R. E. Hodge and Mrs. J. Tabor, appellants, and Muscatine County, *et al.*, appellees, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State,

on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said R. E. Hodge and Mrs. J. Tabor, appellants, as aforesaid, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice
48 done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of November, in the year of our Lord one thousand nine hundred and three.

[Seal U. S. Circuit Court, Southern District Iowa.]

EDWARD R. MASON,
Clerk of the Circuit Court of the United States
for the Southern District of Iowa.

STATE OF IOWA, *ss:*

Allowed by—

CHARLES A. BISHOP,
Chief Justice of the Supreme Court of Iowa.

Bond on appeal fixed at two hundred and fifty dollars.

CHARLES A. BISHOP,
Chief Justice of the Supreme Court of Iowa.

49 [Endorsed:] 7 No. 22367 Law Equity Probate Supreme court of Iowa —— county R. E. Hodge *vs.* Muscatine Co. Writ of error. Copy fee $—. Filed Nov. 14 1903 Jno. C. Crockett clerk supreme court. Dunshee & Dorn attorneys Des Moines, Iowa.

50 STATE OF IOWA, *ss:*

I, Jno. C. Crockett, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record, opinion, and final judgment in the case of R. E. Hodge and Mrs. J. Tabor, plaintiff- in error, *vs.* Muscatine County *et al.* defendant- in error, as full, true and complete as the same are of record and on file in my office.

I further certify that the writ of error, citation and supersedeas bond, with the order of approval to operate as a supersedeas endorsed thereon, are hereto attached in original form, and that true and correct copies thereof have been retained in my office, and this return is made in obedience to said writ of error.

In testimony whereof witness my signature and the seal of said court, at Des Moines, Iowa, this 24th day of November 1903.

[Seal of the Supreme Court of Iowa.]

JNO. C. CROCKETT,
Clerk of the Supreme Court of Iowa.

51 In the Supreme Court of the United States.

R. E. HODGE and MRS. J. TABOR, Plaintiffs in Error,
vs.
MUSCATINE COUNTY AND THE TAXING OFFICERS OF MUSCATINE County.

The appellants in compliance with sec. 9 of rule X of this court, designate the following as a portion of the record of this cause which they think necessary for the consideration of the errors assigned by them, to-wit:

The entire abstract of record filed by the plaintiffs in error in the supreme court of Iowa, with the exception of the first amendment to the petition found on page 11 of said abstract, and the third amendment to the petition found on page 14 of said abstract of record; the opinion of the Iowa supreme court, and the decree entered by the supreme court of Iowa.

Plaintiffs in error do not rely upon the questions raised in the said first and third amendments to their petition.

JUNIUS PARKER,
DUNSHEE & DORN,
Attorneys for Plaintiffs in Error.

I hereby accept due and legal service of the above and foregoing this 7″ day of December 1903

ED. P. INGHAM,
Att'y for Muscatine County et al.

52 [Endorsed:] File No. 19,144 Supreme Court U. S. October term, 1903. Term No. 493. R. E. Hodge *et al.* P. E. *vs.* Muscatine Co. *et al.* Designation by pl'ff- in error of parts of record to be printed & acceptance of service of same. Filed Dec. 12", 1903.

53 In the Supreme Court of Iowa.

R. E. HODGE, MRS. J. TABOR, Plaintiffs in Error, *vs.* MUSCATINE COUNTY. } Designation of Record by Defendant in Error.

Comes now Muscatine County and in compliance with the rules, asks that the following portion of the record in this cause be printed, to-wit: the opinion of the Iowa supreme court, and the decree entered by the supreme court of Iowa, and the entire abstract of record used in the Iowa supreme court, with the exception of the first and third amendments to the petition.

HENRY JAYNE,
Att'y for Muscatine County.

Admitted 1887

54 [Endorsed:] File No. 19,144. Supreme Court U. S. October term, 1903. Term No. 493. R. E. Hodge *et al.*, pl'ffs in error *vs.* Muscatine Co. *et al.* Designation by def'ts in error of parts of record necessary to be printed. Filed January 19", 1904.

Endorsed on cover: File No. 19,144. Iowa supreme court. Term No. 493. R. E. Hodge and Mrs. J. Tabor, plaintiffs in error, *vs.* Muscatine County *et al.* Filed November 27", 1903. File No. 19,144.

FILE COPY.

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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

FROM THE SUPREME COURT OF IOWA.

CHARLES P. COOK *et al.*

No. 93.

vs.

COUNTY OF MARSHALL, STATE OF IOWA.

ROBERT E. HODGE *et al.*

No. 150.

vs.

MUSCATINE COUNTY, STATE OF IOWA, *et al.*

BRIEF FOR PLAINTIFFS IN ERROR.

JUNIUS PARKER,
Attorney.

W. W. FULLER,
FRANK S. DUNSHEE,
JUNIUS PARKER,
Counsel.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

In the Supreme Court of the United States.

CHARLES P. COOK *et al.* vs. COUNTY OF MARSHALL, STATE OF IOWA.	No. 98.

ROBERT E. HODGE *et al.* vs. MUSCATINE COUNTY, STATE OF IOWA, *et al.*	No. 150.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

These cases are here by writ of error from the Supreme Court of Iowa. They have to do with the validity and effect of the same statute of the State of Iowa, and, by stipulation of counsel and order of the Court, are heard as one case. For brevity and convenience the first-mentioned case will be referred to herein as the Marshall County case, and the second-mentioned case as the Muscatine County case.

The Marshall County case went to the Supreme Court of Iowa on appeal from the District Court of Marshall County, and the Muscatine County case from the District Court of Muscatine County, Iowa. In each of these cases the plaintiffs in error filed petitions to be released and relieved from a cigarette mulct tax, as it is familiarly known to the Courts of Iowa. The party dealing in

cigarettes and liable personally to the tax, and the owner of the real estate upon which the tax becomes a lien, brought these petitions and are the plaintiffs in error here. Upon the filing of the petitions and amendments to petitions, which amendments were filed by leave of Court, the respective defendants in the court below demurred to such petitions on the ground that they did not state a cause of action. These demurrers were sustained, appeals taken to the Supreme Court of the State of Iowa, where the judgments of the lower court were affirmed, and the cases are brought regularly to this Court on writ of error from the Supreme Court of the State of Iowa.

The tax from which plaintiffs in error sought remission is a tax of $300 per year levied in accordance with a statute of Iowa collated as Section 5007 of the Code of Iowa, which statute is as follows:

> "There shall be assessed a tax of $300 per annum against every person, partnership or corporation, and upon the real property and the owner thereof within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for use in making cigarettes, or for the purpose of being filled with tobacco for smoking, are sold or given away or kept with intent to be sold or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected aad distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property, both personal and real, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the State."

Defendants in error by their petitions, contentions in the Supreme Court of Iowa, and assignments of error in this Court, have contended that the foregoing statute is

invalid because in contravention of the Constitution of the United States under whatsoever facts such statute may be invoked or sought to be applied, and that it is further in violation of the Constitution of the United States when a tax is sought to be levied upon plaintiffs in error, because so applied such statute is a regulation of and interference with interstate commerce.

Statement of Facts.

These cases were decided, as heretofore stated, on demurrers to the petitions, and there is therefore no contention as to the facts. The plaintiff in error Cook, in the Marshall County case, had a retail cigar and tobacco store, which he leased from the plaintiff in error Plunkett. The plaintiff in error Hodge, in the Muscatine County case, conducted a retail cigar and tobacco store, which he rented from the plaintiff in error Mrs. J. Tabor. Each of these retail tobacco dealers ordered cigarettes from manufacturers, residents of States other than Iowa, which manufacturers had no place of business within the State of Iowa. These cigarettes were delivered to the respective plaintiffs in error by a common carrier, to wit, an express company, which brought them from without the State of Iowa directly to the place of business of the respective plaintiffs in error, in small sealed packages containing ten cigarettes each (the record inadvertently says *blank* cigarettes each, but as shown by the opinion of the Supreme Court of Iowa in the Marshall County case, a part of the record, it is conceded that the packages contained only ten cigarettes each). Each of the retail tobacco dealers sold only the packages of cigarettes so delivered to them respectively. There appears nothing in the record to indicate the means used or method employed by the express company, the common carrier, in transporting these cigarettes from the factory of the manufacturer outside the State of Iowa to the place of business of the retail dealer within the State of Iowa. The only thing that does appear is that the packages sold by them were the identical packages received by them from such common carrier.

Contentions of Plaintiffs in Error.

Upon the case hereinbefore stated and the facts hereinbefore set out, the plaintiffs in error in the Marshall County case and the plaintiffs in error in the Muscatine County case contended in the lower court and in the Supreme Court of Iowa and by assignments of error contend in this court:

FIRST.—That the statute under which the said tax was levied, so far as it was sought to be applied to the sale of cigarettes made by said plaintiffs in error, is void, because in contravention of Section 8 of Article I. of the Constitution of the United States, which section provides that Congress shall regulate commerce among the States. Plaintiffs in error contend that the packages of cigarettes sold were imports, and that by no act or change of condition had such packages lost their character as imports, and that therefore an attempt to forbid or regulate their sale, by the Legislature of the State of Iowa, is an invalid attempt to exercise by such Legislature a prerogative belonging exclusively to Congress.

SECOND.—That the said statute under which the tax as aforesaid was levied is in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies the plaintiffs in error the equal protection of the laws, plaintiffs in error being persons within the jurisdiction of the State of Iowa.

THIRD.—Beside these contentions, the plaintiffs in error in the Muscatine County case contended in the lower court and in the Supreme Court of Iowa, and contend by assignments of error in this court, that the statute under which said tax was levied is in violation of the Fourteenth Amendment to the Constitution of the United States in that it operates to deprive plaintiffs in error of their property without due process of law.

FOURTH.—Plaintiffs in error in the Marshall County case desire to take advantage of said contention marked "*Third*," if the record is in such condition under the rules

of the Court that they can do so, and they contend that under said rules the record is in such condition.

Argument in support of contentions of plaintiffs in error.

Interstate Commerce—Original Package.

In 1900 this Court decided a case (*Austin* v. *Tennessee*, *170 U. S., 343*), which in its facts closely resembles this case, so far as this branch of the discussion is concerned. This case, however, and the contentions of plaintiffs in error herein, do not involve an application for a rehearing of the *Austin* case. The difference between this case and the *Austin* case is small, but a consideration of the prevailing opinion, the dissenting opinion and the concurring opinion in the *Austin* case shows that the distinctions and peculiarities in the *Austin* case that induced the decision and judgment rendered in that case were themselves small. In the *Austin* case it appeared that the cigarettes sold by the dealer were in packages of ten; that they were sealed with an internal revenue stamp; and that in their individual physical condition and size such packages were the counterparts of the packages sold by the plaintiffs in error in this case. It appeared, however, in the *Austin* case that for purposes of transportation these packages of cigarettes were by the express company gathered together and placed in a basket (it did not appear whose property the basket was) and in this basket were conveyed clean to the place of business of the retail merchant in Tennessee, and were there dumped from the basket on to the counter or floor of the retail store. In the case at present under consideration, it does not appear what means were adopted by the express company for its convenience in transportation—so far as appears, and therefore presumably, these packages were carried as any other express packages are carried, to wit, on the floor or in permanently attached receptacles of the express car—these packages were simply packages originally delivered to the express company outside the State of Iowa by the manufac-

turer of the cigarettes, and delivered by the express company to the dealer within the State of Iowa. Presumably during the whole time of transit they were carried by the express company as any other express packages would be carried. It would be idle to contend that this difference is one of great magnitude or seeming legal significance, but under the facts even in the *Austin* case the decision of this Court hung in the balance; it is significant in considering the distinctions between this case and the *Austin* case that in the *Austin* case four members of the Court agreed on a prevailing opinion, four members of the Court agreed on a dissenting opinion that dissented from the entire opinion and judgment of the Court, and the conclusion reached in the prevailing opinion became the conclusion and judgment of the Court only by virtue of the concurring opinion of one member of the Court, which concurring opinion contained these words:

> "Was each particular parcel of cigarettes an original package within the constitutional import of those words as defined by the previous adjudication of the Court? I am constrained to conclude that this question is correctly answered in the negative, not only from the size of each particular parcel, but from all the other surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each, *and the fact that many parcels for the purpose of commercial shipment were aggregated, thrown into and carried into an open basket. Thus associated in their shipment, they could not under all the facts and circumstances of the case, after arrival be segregated so as to cause each to become an original package.*"
>
> *Austin* v. *Tenn.*, 179 U. S., 343–364.

In the prevailing opinion in the *Austin* case it is said that the case there under consideration is the first one presenting distinctly the question whether in holding that the State cannot probibit the sale in its original package

of an article brought from another State, the size of the package is material. It may be fairly said that the case at bar is the first case presenting distinctly and unequivocally to this Court the question whether the *size of the package is controlling*, and whether the smallness of a package in a case which has none of the surrounding facts and circumstances to which the separate concurring opinion in the *Austin* case refers, is to operate to deprive such package of the immunity from State regulation with respect to its sale that such package would unquestionably have, under the Constitution of the United States as declared and enforced by numerous adjudications of this Court, if it were larger.

Plaintiffs in error do not use this case as a petition to rehear the *Austin* case, but they earnestly urge that there be no extension of the principles announced in the *Austin* case, and that, on the contrary, there be put a narrow limit to the authority of that case. To that end, while they despair of adding to the force of the legal argument advanced in the dissenting opinion in the *Austin* case, they do desire to call to the attention of the Court, in connection with the legal contentions and precedents there made and cited, facts with respect to trade in cigarettes and the laws regulating such trade, which, when brought to the attention of the Court, the Court will take judicial notice of.

(*a.*) It cannot now be contended that the immunity given to original packages, or rather to sellers of original packages, from interference or regulation by State legislation is to wholesalers of such packages who sell to retailers, and not to retailers of such packages who sell directly to consumers. It would, indeed, be strange if such a distinction had ever been made by this Court. The whole discussion which is involved in this matter of "original package" has arisen from and turns upon the following question: "At what time do goods that have been articles of interstate commerce cease to be articles of interstate commerce and become as other property in a given State?" The difference between a wholesaler and a retailer is a personal difference, depending on the

amount of goods they sell, and the *status* of such goods certainly cannot be determined, influenced or colored by the quality, character or *status* of the person in whose custody they are. So long as the *status* and condition of goods that have been articles of interstate commerce are such that they may still be called such articles of interstate commerce, they are within the domain of congressional regulation as to their carriage and disposition, and when this *status* has been subject to change, the law ceases to regard them as articles of interstate commerce, and thereafter treats them just as it would like goods produced in a given State and never the subject of interstate commerce; therefore, in this changed *status* and condition they are no longer subject to the authority of Congress, but may be regulated as to their holding, carriage and disposition by the Legislature of the State in which they are situate.

In view of this, it is not strange that this Court has held that "the right of the importer to sell does not de-
" pend upon whether the original package is suitable for
" retail trade or not, but is the same whether to con-
" sumers or to wholesale dealers, provided he sells in
" original packages." In the case from which this citation is made, one of the two contentions of the defendant, who insisted against the immunity of the original package from State regulation was that "If the right of citizens of
" another State to send oleomargarine into the Common-
" wealth of Pennsylvania be admitted, it can only be in-
" troduced in original packages suitable for wholesale
" trade; and where the article imported is intended and
" used for the supply of the retail trade or is sold by retail
" directly to the consumer, the package in which it is
" imported from another State is not an original package
" within the protection of the interstate commerce pro-
" vision of the Constitution of the United States." It was in reply to and denial of the soundness of such contention that the Court used the language quoted, and while two members of the Court dissented from the prevailing opinion, it does not appear that there was any dissent from so much of the prevailing opinion as concerned the point now under discussion.

Schollenberger v. *Penn.*, 171 U. S., 1.

(*b.*) If the test, as intimated in the prevailing opinion in the *Austin* case, and also as intimated in the opinion of the Supreme Court of Iowa in the Marshall County case, is to be the *ordinary* package of shipment, and the position of the Court is to be that immunity will be given to the *ordinary* package of shipment, and such package be considered an "original package," and that no immunity shall be given to an *extraordinarily* sized package, and such extraordinarily sized package shall not be regarded as an "original package," Courts will be involved in a maze of inquiry arising out of each individual case. Nothing better illustrates this than the condition of the cigarette trade. Cigarettes of a cheaper kind and of a brand that are well established are ordered in large quantities, and are ordinarlly shipped in such large quantities to wholesalers who distribute them among retailers; being staple and being called for in large quantities, the manufacturers take advantage of the cheaper carriage charges that are consequent upon shipments in large quantities as compared with shipments in small quantities. Cigarettes that are of higher price, and whose demand is not so large, are shipped in small quantities, but still to wholesalers, because while all the retailers in a given community do not desire them, a number do so desire them, and such number is large enough to make their distribution through jobbing channels profitable; but the *ordinary* original package of these higher priced and less popular cigarettes is a very different thing from the *ordinary* original package of the cheaper and more staple and popular brands. Cigarettes of still higher price are not sold to jobbers at all, but are shipped directly, and by a high-price carrier, usually an express company, to a retailer here and there who, because of his high-class trade or because of the better profits in their distribution, desires them, and an *ordinary* original package of these cigarettes would be smaller still. Finally, there are manufacturers of cigarettes, as well as of cigars, who advertise a direct connection between manufacturer and consumer, and solicit orders from consumers themselves, making their advertisements more attractive to the ex-

clusive smoker by the offer to mark the cigarettes or cigars with a particular and private mark for each particular consumer. The *ordinary* original package with respect to such last named cigarettes is frequently, at least as to introductory orders, of the exact dimensions as is the original package in the case at bar. It would be a singular and anomalous condition of Constitutional Law if a new and unpopular brand of cigarettes might be sold in a given package containing a given number of cigarettes, as an original package, when the old, established, and popular brand of cigarettes packed in the same way and in the same size package could not be so sold, for the reason that because of its greater popularity it was ordinarily shipped in a larger package. The real question, without respect to whether the package be a package of popular cigarettes or whether it be a package of unpopular cigarettes, is whether the *status* of the package and its contents is such that the authority of Congress extends to it as an article of interstate commerce, or the authority of the State Legislature extends to it as an article that has ceased to be an article of interstate commerce. It would seem to plaintiffs in error as illogical under the existing conditions of the cigarette trade to make this question depend upon whether the package was that *ordinarily* used by the consignor when he came to make a shipment, as was the unsuccessful contention in the *Schollenberger* case that this status and line of demarcation between national control on the one hand and state control on the other depended upon the character of the importer and whether he was a wholesale or retail dealer.

The trade conditions mentioned are so generally and well established that they are of the class of facts of which the Court will take judicial notice (*Austin* v. *Tenn.*, *supra*), but plaintiffs in error apprehend that such trade conditions and the singular effects that might follow the making of this question whether the package was an ordinary or not an ordinary package of importation controlling in determining the limitations of national and State authority have not been brought sharply to the attention of this Court.

(c.) Closely connected with what has been said in opinions referred to as to the immunity of the *ordinary* original package of importation from State regulation, and the non-immunity of *extraordinary* original packages of importation from State regulation, has been in the discussion of the motives of the shipper. The manufacturer of cigarettes has been sometimes criticized, if not denounced, because he has attempted to evade a State statute. It is undoubtedly true that the manufacturer of cigarettes in the case at bar intended and hoped that the consignee of these cigarettes would be able to sell them without making himself liable to State regulation. Can any one suppose that the party, manufacturer or otherwise, who shipped oleomargarine into Pennsylvania (*Schollenberger* v. *Penn.*, *supra*), or that the brewer or distiller who shipped liquors into Iowa (*Leisy* v. *Hardin*, *135 U. S.*, *100*) did not intend and hope for the same immunity? Money invested in United States bonds is not taxable by State authorities, primarily because the courts have held that to tax such bonds is unconstitutional; if a man taking the trouble to bring his wealth into such non-taxable shape and paying the premium therefor, so puts his money beyond the power of the State to tax, is he to be denounced for evading the law? The sale of cigarettes is not *malum in se*—it is merely *malum prohibitum*—and prohibited by statutes in only two States in the United States, Tennessee and Iowa. By virtue of the operation of the Constitution of the United States this statute of Iowa is as absolutely inoperative when sought to be applied to cigarettes so long as they continue under the control of Congressional regulation, as it would be when sought to be applied to sales of cigarettes in Illinois or Nebraska. When a town with power to do so passes an ordinance prohibiting the sale of liquor, and the keeper of the bar-room located within that town removes beyond the corporate limits and by right of license conferred upon him by a higher law—the State statute—opens a bar-room, his old trade may follow him, and his action may to an extent nullify the purpose of the town council that passed the prohibitory statute, and his action in going beyond the corporate limits may be denounced as an evasion

of the ordinance;—but on that account shall the ordinance be given an extraterritorial effect? The boundaries between the authority of Congress and the authority of the State under the Interstate Commerce Clause of the United States Constitution, though not so easily defined as are territorial boundaries, being defined, should be just as fixed, just as definite, and just as immovable from consideration of the purposes and intentions of the parties as territorial boundaries.

Under all the adjudications of this Court, including *Austin* v. *Tenn.*, *supra*; *Brown* v. *Md.*, *12 Wheat.*, *419*; *Bowman* v. *R. R. Co.*, *135 U. S.*, *465*; *Leisy* v. *Hardin*, *135 U. S.*, *100*; *Vance* v. *Vandercook*, *170 U. S.*, *438*; *Rhodes* v. *Iowa*, *170 U. S.*, *412*, and *Schollenberger* v. *Penn.*, *171 U. S.*, *1*, cigarettes that are manufactured without the State of Iowa are from the time they are put in transit until the importer in Iowa breaks the original package, or after he has himself disposed of such original package, under the exclusive regulation of Congress. This power of regulation includes the power to absolutely prohibit this interstate traffic in them (*Lottery case*, 188 U. S., p. 321). While this *status* continues and this authority of Congress may be exercised, the Legislature of Iowa is as utterly powerless to regulate such transit and first disposition—if made before breaking of original package—as it would be powerless to regulate affairs in Illinois or Nebraska, or any other adjacent or non-adjacent State.

(*d.*) The dissenting opinion in the Austin case suggests a hypothetical case, a consideration of which is interesting in this connection: Suppose Congress should take affirmative action and by statute declare that interstate commerce in cigarettes should be only in the original stamped packages, and—as it now provides that there shall not be attached to any stamped package anything that covers the internal revenue stamp—should provide that there should not be put around or upon the internal revenue stamp anything that covered it, but that cigarettes should be only shipped in such prescribed packages, separated from each other and subject to the easy inspection

of the internal revenue officer, but that when so shipped they might be transported into a State without being subject to any State regulation and, being in such prescribed original package, might be sold by the importer without being subject to any State regulation. Would such congressional enactment be valid, or void? There would in such case be no question as to whether the importer was a wholesaler or retailer; no question as to whether the package was an ordinary package or not, because all packages would be of the size prescribed; and no question as to the intention of the manufacturer to evade the law, because his method of shipment would be the only method that he could adopt and to obey the law of Congress. Under the cases cited from *Brown* v. *Maryland*, *supra*, down to this day the sale in the original package by the importer of an article is as much a part of interstate commerce as is its transportation. And so if the other parts of the hypothetical statute would be valid and within the power of Congress, that part which declared that the article when brought within a State in the prescribed form might be sold without respect to State regulation would be valid. Can there be any question that under the decisions of this Court running down to the *Lottery Case* (*188 U. S., 321*) the whole act would be sustained as a constitutional exercise by Congress of its authority to regulate interstate commerce?

> "We should hesitate long before adjudging that an evil (the lottery) of such appalling character carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end *because Congress alone has the power to occupy by legislation the whole field of interstate commerce.*"
>
> *Lottery Case*, *supra*, p. 358.

> "The principles announced in *Gibbons* v. *Ogden*, were reaffirmed in *Brown* v. *Maryland* (12 Wheat., 419–446), after expressing doubt whether any of the evils proceeding from the feebleness of the Federal Government contributed more to the establishing

> of the present constitutional system than the deep and general conviction that commerce ought to be regulated by Congress, Chief Justice Marshall, speaking for the Court, said: 'It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States.' Considering the question as to the just extent of the power to regulate commerce with foreign nations and among the several States, the court reaffirmed the doctrine that the power was 'complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution' * * * *"
>
> *Lottery Case, supra*, p. 348.

And yet the status, condition and method of shipment of the package in the case at bar have been identically the same as would have appeared in the hypothetical case just put. The packages were in fact packages put up in exact accordance with the laws of Congress; they were certainly original packages, and there was no interposition of any basket or other containing vessel. Congress has not by statute spoken and said that commerce in cigarettes shall be free; it has not said that the importer who receives them from without the State may sell them in the original package in which he received them, and shall not be forbidden or regulated in such act by State legislation, but by this silence it has under the decisions of this Court said just those things as emphatically and authoritatively as it could do even by the passage of the most solemn statute.

> "It is also certain that the settled doctrine is that the power to ship merchandise from one State into another carries with it as an incident the right in the receiver of the goods to sell them in the original packages, any State regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution until by a sale in the original package they have

been mingled with the general mass of property in the State."

Vance v. *Vandercook*, *170 U. S.*, *438*, *444*.

"Another established doctrine of this Court is that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will with the subject shall be left free from any restrictions or impositions."

Robbins v. *Shelby Taxing Dist.*, *120 U. S.*, *489*, *493*.

"Whenever, however, a particular power of the general Government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled."

Leisy v. *Hardin*, *135 U. S.*, *100*, *109*.

(*e.*) Since the adjudications of this Court have well settled the principle of the immunity of the original package and goods contained in it from the regulation of State laws, and have well settled that this immunity from State regulation extends to the sale by the importer of such original package of goods, provided that such goods are in fact articles of commerce, it would seem useless to enter into any discussion of the policy or impolicy, the wisdom

or unwisdom, from the standpoint of the statesman, of this constitutional principle first announced by Chief Justice Marshall in *Brown* v. *Maryland* (12 Wheat., 419). Plaintiffs in error believe, though, that the limitation on the doctrine of the protection of the original package announced in the *Austin* case, if such limitation is confirmed and extended by affirming the judgment of the Supreme Court of Iowa in the case at bar, will have a tendency to nullify this doctrine of the freedom of interstate commerce, and tend to make untrue the words of Mr. Justice Bradley in *Stockton* v. *R. R.* (33 Fed., 9): "In matters of foreign and interstate commerce there are no States." It will be noted that the opinion of the Supreme Court of Iowa in the record in the Marshall County case speaks with some disdain of the proposition, considered as an original proposition, that a commodity may be introduced into a State in the original package in which manufactured and there sold by the importer in such original package, although there is a State law forbidding the sale of such commodity. The language of the Supreme Court of Iowa in this respect is in part as follows: "As an original proposition addressed "to common sense, aided by a conscience of average en- "lightenment and uncomplicated by precedent, there "would seem to be no room for doubt that this question "(whether there is protection for the original package) "should be answered in the negative. * * * The ex- "treme and unreasonable extension of the principle "affirmed in *Brown* v. *Maryland*, has been the fruitful "source of much annoyance and embarrassment in many "of the States of the Union." Now, with due deference for the Supreme Court of Iowa, it is contended that as an original proposition uncomplicated by precedent, the principle announced in *Brown* v. *Md.* (*supra*), and extended logically in *Bowman* v. *Railway* (*supra*), *Leisy v. Hardin* (*supra*), *Vance* v. *Vandercook* (*supra*), *Schollenberger* v *Penn.* (*supra*) is an entirely sound principle; that it has been a source of strength to the Union and its commerce, instead of an embarrassment to the States; and that the unimpaired perpetuation and enforcement of the doctrine is essential to the maintenance of a National

Commerce; that the breaking down of the doctrine by courts is fraught with great danger and that when occasions arise, not for a departure from the great cases mentioned, but for a change of conditions so as to give to the States a control in a limited way of this national subject, such change can be better made by Congressional action than by any recession by this Court from the doctrine announced and enforced by it.

So far as cigarettes are concerned, it is very evident that there is no great popular demand for the regulation of their sale by States, and if cigarettes were the only article of commerce there would be small practical danger in abrogating the principle of exclusive national control over the objects of commerce and the carrying of such national control up to the point of a sale by an importer in the original package. Up to the decision of this Court of the Austin case in November, 1900, in 1893 U. S. District Judge Hanford had declared the internal revenue package of ten cigarettes when it was in fact the original package of importation, entitled to the immunity from State regulation (*Washington* v. *Coovert*, unreported, but see 164 U. S., 702, where the State, being appellant, the appeal was dismissed). In 1895 U. S. Circuit Judge Goff decided exactly the same question in exactly the same way (*In re Minor*, 69 Fed., 233). In 1896 U. S. Circuit Judge Sanborn made an exactly similar decision (*McGregor* case, 76 Fed., 956); and in 1897 U. S. Circuit Judge Lurton agreed with the other three distinguished judges mentioned. In this condition, Legislatures might very well have thought that it would be impossible to prohibit the sale of cigarettes by dealers who imported them and then sold them in the original packages in which imported. But in 1900, this Court in the *Austin* case declared that when these packages were shipped in a basket at least, they were no longer original packages and therefore entitled to no immunity, and yet from the date of that decision until now, no State has seen fit to pass a statute forbidding the sale of cigarettes—the statutes in Iowa were passed long before the decision by this Court of the Austin case.

The danger to the commerce of the country from the

narrowing or abrogation of the doctrine of the immunity of the original package from State regulation, and the further doctrine that a sale of such original package by the importer is an act of interstate commerce, lies in the variety of objects that may be brought within the police power of the State. The Legislature that concludes that the sale of cigarettes should be prohibited need go but a little further to conclude that the sale of tobacco should be prohibited, and but a little further still to say that the sale of coffee is injurious to the citizens and should not be allowed. Not only does the police power of the State extend over matters connected with the health of the community, but it extends also over matters connected with their general prosperity and welfare (*Tiedeman on Police Power, p. 2*). It is not unfair to say that the Pennsylvania law directed against oleomargarine, which was considered and condemned by the Court when applied to oleomargarine imported from other States and sold in the original package of importation (*Schollenberger* case, *supra*), was induced not so much by a desire to serve the health of the community as a desire to protect the owners of cows. The danger and the seriousness of the matter has been considered by this Court:

> "Can it be supposed that by omitting any express declaration on the subject Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country. If so, it is left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort or peace of the

community. This policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming in competition with those which it seeks to protect. The police power of the State would extend to such cases as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people."

Bowman v. *R. R.*, *supra*, p. 493.

On the other hand, what menace or embarrassment is there in the upholding in its completeness of the doctrine finally announced in *Leisy* v. *Hardin* (*supra*), and never in the slightest limited or curtailed until the decision in the *Austin* case. We of the United States are one people. Articles good for the mass, articles recognized in our general commerce, are not very bad for the residents of any particular State. If a thing is bad and generally bad, Congress can prohibit interstate commerce in it, and the States can prohibit intrastate commerce in it, as has been done in the case of lottery tickets (*Lottery case*, *supra*). If there is a commodity whose evil effects are so pronounced that Congress concludes that, while interstate traffic in it should not be absolutely prohibited, the people in the various States should be left to prohibit it or not as they choose, Congress can as to such article abdicate its exclusive power and authority over interstate commerce in favor of the States, as it has done in the case of liquor, and such action is valid and effective (*In re Rahrer*, *140 U. S.*, *545*). Until Congress so prohibits absolutely, or leaves it to the States to prohibit, it is better that the States be embarrassed in their attempts to enforce peculiar notions, than that the commerce of the country be involved in the confusion that might result from giving to States a right to declare what shall and what shall not be articles of commerce:

"The wisdom and the discretion of Congress, their identity with the people, and the influence

> which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."
>
> *Gibbons* v. *Ogden*, 9 Wheat., 190 (quoted with approval in *Lottery Case, supra*, 363).

In the foregoing discussion, no argument has been attempted on the proposition that cigarettes are articles of commerce, because by unanimous opinion of the Court that proposition was established in the Austin case. No distinction has been attempted either between this Iowa statute which levies a mulct tax, and what the statute would have been if it has been absolutely prohibitive; this tax is not levied on imported cigarettes, and even considered as a tax statute the case would not be controlled by the principles so recently announced by the Court in *Am. Steel & Wire Co.* v. *Speed*, 192 U. S., 500. As a matter of fact, however, as construed by the Supreme Court of Iowa itself it is not a taxing statute at all, but is a criminal statute. It has not been deemed necessary either to discuss other matters and precedents fully discussed and unanimously agreed upon in the *Austin* case.

Denial of the equal protection of the laws.

In both the Marshall County and the Muscatine County case it was contended in all the courts below, and is contended by assignments of error in this Court, that the statute under which tax in these cases is sought to be levied and collected, is invalid because in contravention of the Constitution of the United States, in that it denies persons within the State the equal protection of the laws. The statute in question contains as its last sentence the following exception: "But the provisions of this section shall "not apply to the sales by jobbers and wholesalers in "doing an interstate business with customers outside the

"State." The effect of the section and its proviso is that notwithstanding the stringent provisions of the body of the section, which operates to levy a penalty on any one, wholesaler, retailer or other person who sells cigarettes or keeps them with the intent that they should be sold or given away under any pretext whatever, a particular class, to wit, jobbers and wholesalers, may keep them with intent that they be sold, if they are to be sold in doing an interstate business with customers outside the State. The retailer may have customers outside the State as well as the jobber or wholesaler, but he is forbidden to supply such customers.

The point of this contention of plaintiffs in error is that this statute with its proviso and exception has made a classification, which classification is entirely arbitrary and not justified by the circumstances, and not founded on reason, and therefore that it is an unequal law and invalid. Since the Fourteenth Amendment was adopted, there have been very many decisions in this Court and in other courts as to what constitutes a denial of the equal protection of the laws, and the attempt has always been made to sustain such laws on the contention that the Legislature had the right to make a classification and make the law apply only to a particular class. It might and would be desirable to prolong the discussion of this point, except for the fact that so recently this Court has thoroughly and authoritatively discussed the whole subject and reviewed all of the authorities. Of course, reference is made to *Connolly* v. *Union Sewer Pipe Co.* (*184 U. S., 540*), where the Anti Trust statute of Illinois was declared unconstitutional because of its proviso that its provision should not apply to agricultural products or live stock while in the hands of the producer or raiser. In the course of the elaborate prevailing opinion in that case the Court, among other things particularly applicable to the case at bar, said:

> "The State has undoubtedly the power of appropriate legislation to protect the public morals, the public health and the public safety, but if, by their

necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, that must be deemed unconstitutional and void."

"The difficulty is not met by saying that generally speaking the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations in order to subserve public objects. For this Court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

"Looking then at all the sections together, we must hold that the Legislature would not have entered upon or continued the policy indicated by the statute unless agriculturists and livestock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section."

In the great case from which these quotations are made, it might have been contended, and doubtless was, that there was a reason for the classification, and that it was not absolutely arbitrary, because the public interest could suffer but little, if at all, from combinations among the original producers of livestock or agricultural products, just as it may be contended in the case at bar that the public interest may suffer but litttle from the sale by wholesalers and jobbers in their interstate trade. But the Court in the *Connolly* case refused to be misled by this question of degree of harm, and held that there was no reasonable justification for the classification, and that the whole statute must therefore fall.

Taking the definition as given in the Standard Dictionary as correct, the Legislature of Iowa in giving the exemption to jobbers *and* wholesalers acted advisedly, for the two terms are not synonymous. A jobber is "one "who buys goods in the bulk from the importer or manu- "facturer, and sells to the retailer," but a wholesaler is simply "a dealer in large quantities," and may sell to consumers as well as to retailers. This definition of "wholesaler" is not scholastic, but is well recognized in the trade—large consumers buy from "wholesalers" habitually all sorts of articles, and thus secure a lower price, and when one seeks to make a purchase from a "wholesaler" he is not asked whether he will consume or sell to consumers the goods so purchased; the question is only as to the quantity he will purchase. So we have a privilege given to the large dealer which is denied the small, and it is to traffic in an article that the Legislature of Iowa conceives to be hurtful to the public health or morals. The reasonableness of this classification reminds one of the reasonableness of the rule that a large package of an article deemed by a State Legislature to be harmful to the public health or morals, may have the immunity of an original package, while a small package is denied such immunity. If the classification in this statute is to be upheld as reasonable, and if it is believed that dealing in cigarettes is harmful to the public health or morals, we have the singular condition that the greater the extent of the injury the less the crime.

It has not been usual for Legislatures to except from the operation of a statute the large dealer or producer and leave under its condemnation the small; the tendency has been just otherwise, and the Court considered this opposite tendency in the case of *Cotting* v. *Stockyards Co.* (*183 U. S., 79, 112*), where, with the concurrence of the whole Court, Mr. Justice Brewer said:

> "There can be no pretense that a stockyard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a State may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made."

Just how considerable and significant would be the privilege given to all dealers in Iowa, irrespective of magnitude of dealing, to sell to their customers in interstate business, it seems to plaintiffs in error is not material. Iowa has, perhaps more than any other State, border towns, each of which has a corresponding town outside of the State just across the border. It was undoubtedly to protect the merchants in such border towns in their competition with merchants of Illinois, Nebraska, Missouri and Minnesota for the trade both of retail merchants and consumers in these respective States, that this proviso was enacted. The merchant who sells in large quantities in Davenport, Clinton, Sioux City and Council Bluff, is free to supply his trade with cigarettes, but the merchant in these same

cities whose sales are not in sufficiently large quantities to bring him in the class denominated as "wholesalers," is forbidden.

Taking of property without due process of law.

As will be observed in the opinion of the Supreme Court of Iowa appearing in the record in the Marshall County case, plaintiff in error in that case contended that this statute is invalid because the Constitution of Iowa forbids putting anything into a statute that is not indicated by its title, and the contention of plaintiffs in error was that this section, levying a tax on cigarette dealers, had been passed only under the title, "An Act to Revise, Amend "and Codify the Laws Relating to Crimes and Their "Punishments," and that the section involved here was therefore invalid. The Supreme Court of Iowa denied that contention, and in the course of its opinion said:

> "Bear in mind that this statute as a whole is an attempt to restate not only the law defining crimes and misdemeanors, but the remedies to be applied for suppressing and punishing the same. It certainly was competent for the Legislature under the head to designate those acts which, in its wisdom, should be forbidden as against public policy, and to include therein the traffic in cigarettes. The authorities to this effect are too numerous and familiar to require citation. In codifying these statutes the Legislature found already upon the statute book the prohibition now carried into Section 5006, and in carrying it into the Code amended it by adding thereto Section 5007, providing for the mulct. That it was intended as an aid in suppressing and punishing violations of the provisions of the preceding section seems too clear for controversy. While called a 'tax' it is a 'mulct' tax, and a mulct is a fine imposed for an offense, a penalty."

In this condition of the Marshall County case, and after the Supreme Court of Iowa had taken this view of the statute in question, the plaintiffs in error in the Musca-

tine County case, which involved the same statute, set up the contention in the courts below that the statute as thus construed operated to take property without due process of law, and such contention was made in the Supreme Court of Iowa, and was indeed the only question discussed in the opinion of that Court as shown by the record in the Muscatine County case. This contention has not been heretofore made in the Marshall County case, for the reasons indicated, but plaintiffs in error in the Marshall County case desire now to make such contention, and believe that upon the condition of this record and the authorities, they are entitled so to do, although now is the first time that they have made it.

If a question is one as to foundation of right, it may be decisive in the Supreme Court of the United States, though not pressed, and, indeed, though waived, in the lower Court.

> *Mining Co.* v. *Societe des Mines*, 164 U. S., 261, 265.

> "Where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a State statute is drawn in question, and the decision is in favor of its validity, this Court has repeatedly held that if the federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here."
>
> *Water Power Co.* v. *St. Ry. Co.*, 172 U. S., 475, 488.

This last cited case contains a thorough discussion by Mr. Justice Brown, concurred in by the whole Court, of the matter of not having raised federal questions below, and the effect upon such condition of Section 709 of the Revised Statutes. In this opinion there is drawn a distinction between cases in which there is in question the validity of a statute on the ground of its being repugnant to the Constitution of the United States, and cases where

right, privilege or immunity is claimed under the Constitution or a statute of the United States. In the latter class of cases such right or immunity must be distinctly set up in the Court below, and not being set up will be conclusively presumed to be waived, but in the first class of cases the rule requiring that the invalidity of the statute and the distinct ground for such invalidity shall be set up in the Court below is less rigorously enforced.

The citation of other authorities is needless after their full review in the case last cited, but it would seem to plaintiffs in error that this Court, having certainly obtained jurisdiction of the Marshall County case by the undoubted federal question involved in the attack on the validity of the statute in question, because it denies equal protection of the laws, and because as applied to the facts in the case it amounts to an attempt to regulate interstate commerce, will examine the statute in all its aspects to determine whether it is in conformity with the Constitution of the United States and therefore valid, or whether it is in conflict with some clause of the United States Constitution and is therefore no law. The question might be different if this Court was considering whether it would assume jurisdiction of the case, but having such jurisdiction, the failure of the Court to consider this alleged unconstitutionality of the statute in question, because it deprives plaintiffs in error of property without due process of law, in the Marshall County case, while the point is certainly distinctly and sufficiently raised in the Muscatine County case, might lead to the very singular situation and result that the plaintiffs in error in the Marshall County case would be subject to the penalty of a statute which in the same decision of this Court in support of the contention of the Muscatine County plaintiffs in error, is held absolutely void.

On account of the foregoing considerations, it seems to plaintiffs in error that they and all of them are entitled to have the judgment of this Court on the question now under discussion, but the plaintiffs in error in the Muscatine County case are certainly entitled to have such judgment.

Just as there have been many judicial opinions on that section of the Fourteenth Amendment which forbids the

denial of equal protection of the laws, so there has been much discussion of the equally important section of the Fourteenth Amendment which forbids the taking of life, liberty or property without due process of law, and no single opinion of the Court, much less brief and argument in a case, can be hoped to review in any thorough way these authorities. Mr. William D. Guthrie, in his lectures on the Fourteenth Amendment (p. 70) quotes as perhaps the most frequently quoted definition of "due process of law," the definition given by Mr. Webster in his argument in the Dartmouth College case, of "law of the land: "By the law of the land is most clearly intended the "general law; a law which hears before it condemns; "which proceeds upon inquiry and renders judgment "only after trial. The meaning is that every citizen "shall hold his life, liberty, property and immunities "under the protection of the general law which governs "society. Every law which may pass under the form "of an enactment is not therefore to be considered the "law of the land." It is undoubtedly true that the necessities and inconveniences of the case have induced courts, and this Court, to resolve doubts in favor of the validity of taxing laws, in cases where, if the subject had been other than taxation, such laws would likely not have been upheld. Many of these authorities are cited in the opinion of the Supreme Court of Iowa in the record in the Muscatine County case. The general rule is well established that taxing statutes will not be held to have the effect of depriving one of property without due process of law, if they provide for the imposition of taxes on property in general with reasonable and fixed times for applications for reduction of assessments, &c., although the owner of the property taxed has no actual notice of the amount of assessment and such other matters.

But plaintiffs in error contend that even if Section 5007 should be considered a tax law and not a criminal statute the procedure involved in it and in the liquor mulct tax law to which it refers is not due process of law, in that it makes provision for fixing a lien and a personal judgment upon the owner of real estate without any sort of notice, actual or constructive, to such owner that his real estate

is becoming subject to a lien, and he subject to personal judgment. The cigarette mulct tax provides that it shall be levied, collected and distributed in the same way as the liquor mulct tax, and reference must therefore be made to the liquor mulct tax law contained in the Code of Iowa of 1897 at Secs. 2432 *et seq.* The Supreme Court of Iowa has held, and plaintiffs in error are concluded by such holding, that Sections 2441 and 2442 of the Code of Iowa of 1897, with respect to applications for remission of the liquor mulct tax law, are applicable, and that under them applications may be made for remission of the cigarette mulct tax. These sections provide, in short, that at the meeting of the Board of Supervisors of the county next following the listing, application may be made to remit the tax by a petition filed with the County Auditor at least eight days before the time for the consideration of the case, and that on the application to remit the owner of the property may be heard in support of the same, and that evidence of the general reputation of the place will be admissible. This listing is made on the last day of December, March, June and September in each year (*Code of Iowa, Sec. 2437*), and the meetings of the boards of supervisors are held on the first Mondays, in January, April, June and September, of each year (*Code of Iowa, Sec. 412*). Without considering the matter of the eight days' notice, we have the fact that an application for remission of a tax levied on the last day of December must be made on the first Monday of January, which may be the following day but one, and the party who fails to make such application at that time is under the statute estopped from making it thereafter. No provision, however, is made for notice, even to the tenant who is alleged to have sold the cigarettes, and no provision is made for notice to the owner of the property at all. The payment of the tax cannot be enforced until one month after it has become delinquent, and its payment may be enforced even when delinquent at the option of the treasurer (*Code of Iowa, Sec. 2440*). It is perfectly true that notice of the imposition of a license tax or special assessment does not have to be given, and it may be admitted that no notice would be required to be given to the dealer, the tenant, who sold

cigarettes (*McMillan* v. *Anderson*, 95 U. S., 37), but the petition in the Muscatine County case of the plaintiff in error, who was the owner of the real estate, illustrates the viciousness of the statute in that it provides for no notice whatsoever to the owner of the real estate. This plaintiff in error did not sell cigarettes, and did not authorize any one else to sell cigarettes, and in her petition, the demurrer to which was sustained, she states that she had no knowledge whatever that cigarettes or cigarette paper were being sold on her premises, and never consented to the same, and in fact put a stop to the sale of cigarettes as soon as it was brought to her attention. Notwithstanding all this, her property and herself have been subject to a judgment for the amount of the quarter's tax, and it may be collected by the treasurer as well from her property and herself as from the dealer. The owner of property knows that in the nature of things his property is subject to be assessed for general taxes, and is liable also to be specially assessed for local improvement, and if he is given reasonable opportunity to be heard as so value, then due process of law is not denied him. Those who engage in a profession or trade know that in the nature of things there may be license taxes imposed upon them, and they cannot claim that due process of law is denied them, although no actual notice is given them, if they have an opportunity along with others to appear and protest. The law on this subject is well expressed in one of the leading cases on this subject: *Hagar* v. *Reclamation District* (*111 U. S., 701, 709*):

> "Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such case the Legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the

delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it. But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the States provision is made for the correction of errors comi mitted by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

The selling of cigarettes was made a crime in Iowa by Section 5006 of the Code, which is a simple criminal statute. A party who leases real estate for general mercantile purposes has no reason to assume that it would be used in committing the crime forbidden by Section 5006 of the Criminal Code of Iowa. Without notice or knowledge that such was being done, the owner of the real estate is subjected to the deprivation of her property, and it is no defense to her under this statute to say that she had no knowledge and gave no consent to the illegal practice. The only question that can be raised in her favor is that her tenant did not sell the cigarettes, and even upon this question evidence of general reputation is admissible against her. A statute that provides for such a proceeding and which not only may, but in the Muscatine County case does lead to this result, may constitute and provide for due process of law, but if it does then all significance in the guarantee of this is lost.

This question has been considered as if the statute were an ordinary tax statute. It is in fact not such, but, in the language of the Supreme Court of Iowa, while it provides for a tax, the tax is a "mulct" tax, and the passage of the statute was merely meant to put more easily collected, if not heavier, penalties on the sale of cigarettes (see opinion of the Supreme Court of Iowa in the record in the Marshall County case). We have, then, looking only at the position of owners of real estate, a statute, the effect of which is to penalize such owner because of the criminal act committed on his premises, in the commission of which criminal act such owner had no hand at all, and of which he had no notice. It is as if by statute of the United States the owner of premises in which counterfeiting is committed should become subject to a penalty and fine, which penalty and fine would be remitted not upon his showing that he had no knowledge of and had not participated in such counterfeiting, but upon his showing that the tenant of the building had not in fact been guilty of counterfeiting on the premises. The Supreme Court of Mississippi considered a question very similar to that here

involved in *McBride* v. *State* (*70 Miss., 516*), in which there was before the Court a statute of Mississippi which provided that any person unlawfully selling liquors or permitting them to be sold at his place of business, should pay the city, town or village where the offense was committed the sum of $500, and that the Sheriff or State Revenue Agent could assess and collect such penalties by distress. The similarity, not to say identity, of this statute with the section under consideration by the Supreme Court of Iowa in the Marshall County case, is striking. Selling liquor in a certain manner was already unlawful under the statute of Mississippi, just as selling cigarettes under any circumstances was already unlawful under the statutes of Iowa. The State was under some difficulty, perhaps, in convicting a suspected party of a breach of this statute, because under the criminal procedure of every civilized country it devolves upon the prosecution to prove its case, and the same difficulty and embarrassment with respect to the sale of cigarettes likely devolved upon the police authorities of the State of Iowa. As an additional and easily executed provision of the criminal law, with the purpose in the Mississippi case to deter the sale of liquor, and with the purpose in the case at bar to deter the sale of cigarettes, there is inserted the provision for a penalty, in the one case called a penalty and amounting to $500, and in the other case called a "mulct tax" and amounting to $300. The Supreme Court of Mississippi disposed of the statute in the following language (p. 723):

> "It certainly requires no argument or citation of authorities to uphold the proposition that it is not within the power of the Legislature to provide for the infliction of a penalty, and its collection by summarily, without a judicial proceeding, fixing it upon the party to be charged. The constitutional provision by which it is declared that 'no person shall be deprived of life, liberty or property except by due process of law' would be practically abrogated if it should be held within legislative competency to commit to the hands of an executive officer the exercise of the power of seiz-

ing the property of the citizen to enforce an unadjudged penalty."

In the case just cited, the only parties to the litigation were parties alleged to be those personally guilty of the infraction of the law, and there was no provision for a lien on the real estate of innocent parties. If that decision was right, much more necessary it is that the Court declare that the statute in this case provides for a proceeding that does not constitute due process of law, when the effect of such proceeding is not only to attach and collect under the guise of a tax law a penalty against a criminal, but is also to collect from his landlord, however innocent, this same penalty.

When we leave the point of view of the owner of the property and come to that of the tenant and dealer in cigarettes, we come to the question of criminal procedure, and what constitutes due process of law in criminal procedure. This is so as a matter of substance without respect to whether the statute in question is called a tax statute or a criminal statute. It is called by the Supreme Court of Iowa a criminal statute, and, as an original question, a consideration of the statute thoroughly justifies that Court. By Sec. 5006, the sale of cigarettes has been made criminal. By Sec. 5007 the dealer is subject to this mulct tax of $300 per year, but it is expressly provided that his payment thereof shall not relieve him from the penalties and effect of the previously existing prohibition statute. What can this be, except the imposition of an additional penalty? If the dealer should be arrested and convicted for selling cigarettes under Section 5006, he would be subject to a fine of $50. Is there any reason why, based upon this conviction and the evidence which supported it, the county auditor could not assess him for one quarter's tax under Section 5007? He would, therefore, become liable to a payment of $75 additional. The $50 penalty collected under Section 5006 is collectible only after trial at which the accused is permitted to face his accusers, and in which the specific act must be proven; but the penalty of $75 collected under Section 5007 can be collected by the simple act of the county auditor, or three citizens, in entering

the name of the supposed offender as liable to the tax. This $75 penalty becomes absolutely fixed against him and his personal property and the real estate which he occupies, whether it belongs to him or not, and may be collected by distress, unless he applies for a remission within a fixed and short time, and thereby and thereupon becomes the plaintiff in the case, with the burden upon him of establishing his case, and with the right in the board to which he applies to consider as against him, not only specific acts, but the general reputation of his place of business.

It is not clear what does and what does not constitute due process of law in criminal procedure. In *Low* v. *Kansas* (*163 U. S., 81, 85*) this Court said that "whether the "mode of proceeding prescribed by this statute and fol- "lowed in this case was due process of law depends upon "the question whether it was in substantial accord with "the law in usage in England before the Declaration of "Independence, and in this country since it became a na- "tion in similar cases." The statement is ventured that nowhere and at no time has there been in common usage any system of criminal procedure which provides that a penalty shall be fixed by an executive officer, and that such penalty shall become absolute by a lapse of time, even without any actual notice to the person accused, and that upon application for remission it devolves upon the party accused to take the burden and prove his innocence.

There has been no more exhaustive discussion of this matter of due process of law in criminal proceedings than in the prevailing opinion of Mr. Justice Matthews and the dissenting opinion of Mr. Justice Harlan, in *Hurtado* v. *California* (*110 U. S., 516*). In that case there was considered a provision of the Constitution of California authorizing prosecution of felonies by information after examination and commitment by a magistrate, and without indictment by a grand jury. It is to be marked that preceding the information there was to be an examination and commitment by a judicial officer, a magistrate, and even after the information there was to be a trial in a court of law. With all of these provisions, Mr. Justice Harlan, believed that such provision did operate to de-

prive the citizen of his life, liberty or property without due process of law. The prevailing opinion is otherwise, but in it is an express recognition of the oft-quoted saying of Mr. Webster in the Dartmouth College case, that there must be a "proceeding which hears before it condemns," to constitute due process of law.

The Legislature of Iowa has recognized the vice in its liquor and cigarette "mulct tax" law, and by Chapter 95 of the Laws of 1902, has provided for notice before the levy of tax. This notice is short and summary, and it may be that it does not constitute "due process of law." But it was not provided for and not given in the case at bar. As the law then stood and under the procedure there followed there was a condemnation without a hearing, or a hearing without a notice.

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ARGUMENT AND BRIEF OF DEFENDANT IN ERROR

Supreme Court of the United States

OCTOBER TERM, A. D. 1904

Term No. 98.

C. P. COOK AND ED. PLUNKETT, PLAINTIFFS IN ERROR

vs.

THE COUNTY OF MARSHALL, STATE OF IOWA

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA

F. E. NORTHUP, Attorney for Defendant in Error

(19,036)

(19,036)

Supreme Court of the United States

OCTOBER TERM, A. D. 1904

Term No. 385

C. P. COOK AND ED. PLUNKETT, PLAINTIFFS IN ERROR

vs.

THE COUNTY OF MARSHALL, STATE OF IOWA

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA

Argument and Brief of Defendant in Error

F. E. NORTHUP, Attorney for Defendant in Error

STATEMENT OE ERRORS COMPLAINED OF.

The jurisdiction of this court is invoked by plaintiffs in error on the grounds:

One. That they have certain rights granted under the constitution of the United States which have been violated in the enforcement of the provisions of Section 5007 of the Code of Iowa, the section in question being as follows:

"There shall be assessed a tax of $300 per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for use in making cigarettes or for the purpose of being filled

with tobacco for smoking, are sold or given away, or kept with intent to be sold, bartered or given away under any pretext whatever.

"Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property both personal and real used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing interstate business with customers outside the state." Section 5007, Code of Iowa.

Two. It is claimed that the said act is in contravention of Section 8 Article 1 of the Constitution of the United States presumably under the claim that it is an attempt "to regulate the commerce among the several states," and it is further in conflict with Section 10 Article 1 of the Constitution of the United States in that such a law is "an exercise of the taxing power which is subject to the exclusive control of Congress."

Three. The claim is further made that said Section 5007 of the Code of Iowa under which a certain assessment and tax was levied against the property of plaintiffs in error was in violation of the Fourteenth Amendment of the Constitution of the United States in that "it denies to said plaintiffs in error the equal protection of the laws, they being residents within the jurisdiction of the State of Iowa." The statement of the case in question is well and conscientiously made in the opinion of Justice Weaver of the Supreme Court of the State of Iowa, as appearing in the transcript of record heretofore filed.

It will be observed that the legislature in framing the law in question did not intend the same to usurp any of the functions of congress and by the very language of the act itself expressly exempted transactions of interstate commerce with customers outside of the state. The language in this respect of the act in question being "but the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing interstate business with customers outside of the state." Section 5007, Code of Iowa.

We do not apprehend that it will be seriously contended that the said act as applied to transactions and sales of cigarettes within the state not affesting interstate commerce, is unconstitutional. Plaintiffs in error claim the protection of the interstate commerce law, without making claim of coming within the exception as contained in the provisions of said act, and while not denying their traffic in cigarettes within the state of Iowa and while not claiming that the goods were in any manner affected while in transit do claim that they were only selling and handling said goods in the original package as received from the manufacturer in another state and that therefore they were exempt from taxation. The whole contention in this case we believe is strictly at issue upon the question OF THE GOOD FAITH OF THE TRANSACTION. As bearing upon that feature it is competent to observe the "original package" which is the subject of controversy. In this case it is disclosed, that it is not claimed that the package in question, consisting of a small cigarette box containing 10 cigarettes was shipped independently and by itself and was packed, labeled or consigned in any manner as a commercial production. The best that can be said of it being that we do not know how it came from the hands of the manufacturer into the

hands of the dealer, it being urged that "neither the American Tobacco Company nor any of its employees fnrnished any box, bale, bag, wrapping or any covering for these packages nor in any way attached them together." They were delivered by the express company and did not bear any mark or address upon them, it being conceded however that they traveled collectively and were held together and kept in mass by the watchful eye of the express company alone as they were in transit, it being contended that by the absence of such wrapping or placing in a box or receptacle that they therefor each retained their identity as original packages. By the application of sound reason and common sense to the transaction it was plainly an effort to render the provisions of the statute a nullity and is a clear and palpable attempt to evade the law. It cannot be urged that it is an "original package" such as was contemplated by the courts in using the term in question, as they, undoubtedly contemplated that the package would be of sufficient dimension to be likely to be broken up and distributed to the retail trade by the dealer.

It seems to have been in contemplation of the mind of the courts who have followed the long line of "original package" decisions hereinafter referred to that it was such a bale, package, cask or collection as would be likely to assume proportions with an idea of convenience in shipment and safety in transit and bearing through all the stages of its transition from the manufacturer to dealer a separate and distinct identity.

In the case of *Austin vs. Tenn., 179 U. S., 343*, the court had occasion to refer to the case of Brown vs. Maryland, the opinion by Chief Justice Marshall, and quoting the language of that case say, "whether the decision would have been the same if the original package in that case, instead of being bales of dry goods or hogsheads, barrels or tierces of liquor, had been so

minute in size as to permit their sale directly to consumers may admit of considerable doubt. Obviously the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import goods from foreign countries. It is safe to assume it did not occur to the chief justice that by skillful alteration af the size of the packages the decision might be used to force upon a reluctant people the use of articles denounced as noxious by the legislatures of the several states." Again in none of the decisions so far as we have been able to ascertain aside from the Austin case above, was the question ever presented to the Supreme Court of the United States claiming that so infinitesimal a package as a box of cigarettes could deserve the distinction of being an "original package." It is a well known maxim of law "that the law does not concern itself with trifles." We do not believe that the court will go far in hair-splitting deductions, to sanction a commerce said to be limited to the transportation of a single package of ten cigarettes.

In the case of Leisy vs. Hardin, 135 U. S., 100, no question was made with regard to the casks being "original packages" or as to the fact that according to the custom of brewers beer was usually and ordinarily imported from one state to another in casks of this size. In that case the quantities seized by the city marshal of Keokuk under a state statute prohibiting the sale of intoxicating liquors was *122 quarter barrels of beer; 171 1-8 barrels and 11 cases.* It was justly held that "being articles of lawful commerce the state could not in the absence of legislation on the part of congress prohibit their importation from abroad or from a sister state, or when imported prohibit their sale by the importer, or that they did not become a part of the common revenue property within the state so long as they

remained in the casks in which they were imported and continued to be the property of the importer."

In *Schollenberger vs. Pennsylvania., 171 U. S. I.*, the packages sold *were of 10 pound weight* and in that case oleomargarine was recognized as a lawful article of commerce and when it could not be wholly excluded from importation into a state from another state, where it was manufactured, and so long as it remained in its original package, could be sold notwithstanding a statute of the state prohibited such sale. We doubt very much if in the case of *Leisy vs. Hardin* the liquor had been imported in half pint bottles and shipped collectively to be sold and distributed by the retailer that the court would have considered each one an "original package," especially if it had been made to appear that they were so bottled and shipped for the exbress purpose of evading the law. Indeed the decision which originally recognized the "original package" and which has been the foundation of all subsequent decisions along that line, *was made with reference to foreign commerce only* and were employed in discussing the constitutional prohibition of duties and imposts by state authorities, and did not involve any consideration of interstate commerce.

Cites—*Woodruff vs. Parkam, 8 Wall., 123.*

The majority opinion in the case of *Austin vs. Tenn., supra*, noted the distinction.

The term "original package" relates wholly to goods prepared for transportation and is generally said to be a parcel, bundle, bale, box or case made up of or "packed" with some commodity with a view to its safety and convenience in handling in transportation.

Keith vs. State, 91 Ala., 2.

State vs. Board, 46 La., 146,

Austin vs. State, 101 Tenn., 563.

While it has been recognized in the case of *McGregor vs. Cone, 104 Ia., 465*, that such "original

package" need not be securely boxed or encased but it has reference "to the unit which the carrier receives, transports, and delivers as an article of commerce. The importer decides for himself the size of the package which he desires to import and when he delivers it to the carrier for transportation he gives it the initial step and from that time until sold in that form or broken, and transformed, it is the subject of interstate commerce. But when sold or broken or when it changes form, it ceases to be an article of interstate commerce, and no longer enjoys this protection. * * * If sold, it must be in the form as shipped or received; for, if the package be broken after such delivery, it, by that act alone becomes a part of the common mass of property within the state and it is subject to the laws of that state enacted by virtue of its police power."

In that case the "original package" the unit of commerce was broken, the contents exposed to sale and by such sale it lost its distinctive character as an import. In the case at bar, assuming that the packages of cigarettes were delivered in bulk we cannot see any reason for the rule which would determine that a box containing packages of cigarettes thrown in loosely would be different from a consignment of cigarette boxes shipped loosely and handled as a mass, even though in the language of Justice Weaver of the Supreme Court of Iowa, "that they were handled by carrying the boxes as ants carry sand, one grain at a time." It is aptly stated, in his opinion, in the case at bar that "we may rightfully assume that the express company in receiving and shipping these little boxes did it in a rational manner by gathering them, if not in baskets in receptacles of some suitable and convynient kind."

We think the loss of one cigarette box would have changed the identity of the shipment and that in fact

the identity as an "original package" applied to the entire mass of cigarette boxes taken as a whole and not each individual element thereof. If a package of commeace is capable of being declared an "original package" without reference to its convencience or safety in handling or its importance then as well could it apply to a single cigarette as to the small box of 10 cigarettes. The rule heretofore announced with reference to the "original package" as in the case of Leisy vs. Hardin, 135 U. S., 100, had application to the original and unbroken and unopened package. But in the case at bar the defendants in error contended that the package was broken and open from the time of consignment until its receipt by the retailer and afterwards in his possession at the time the tax was imposed. That so far from being an "original package" in this instance it is our contention that it never possessed the incidents and attributes of an "original package."

We believe for other good reasons well defined in the law the act in question could not be held unconstitutional. Every presumption and intendment in which the court can reasonably indulge should be considered before declaring any act invalid. Especially is this true when it is enacted as a police regulation and its operation is for the protection of the morals and health of the inhabitants of a state. It must be a clear usurpation of prohibited power. While it will be contended that there may be certain cases of such public importance involving a principle of such general application that it would be hardly proper to consider the spirit and intendment of the constitution, gathered by implication, yet such reason and authority is not to be invoked in aid of an enterprise obnoxious to justice and good government. The statute canuot be unconstitutional solely because of an unjust or oppressive provision or because it is supposed to violate some

right unless it be shown that such injustice or oppression is prohibited or such rights guaranteed or protected by the constitution.

Objections to the policy of a legislative enactment have no place in the consideration of this case so long as it is free from objection on constitutional grounds.

"The exercise of legislative powers may be justified on the ground of police power, which would otherwise be unconstitutional, when they are such only, as are requisite for the safety, comfort or necessities of the public, and when they are such as the framers of the constitution as men of ordinary prudence could not be supposed to have intended to prohibit, despite the language of Prohibition."

People vs. Jackson Co., 9 Mich., 285.

New Orleans Gas Light Co. vs. Louisiana Light & Heat Co., 115 U. S., 650.

Black on Constitutional Prohibition Sec. 62.

It is conceded that a state can, for the purpose of protecting its people against the evils of intemperance enact laws which regulate commerce between its people but not with those of other states of the Union unless with the consent of congress either express or implied first obtained.

Bowman vs. Railroad Co., 125 U. S., 465.

It seems to haye been questioned in the same case as to whether the right of protection of an article of commerce from one state to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where transportation terminates, but, in Leisy vs. Hardin. 135 U. S., 100, the court went even farther in holding that a sale by the importer in the "original package" or case unbroken or unopened could not be regulated by legislative enactment and that an attempt to do so was unconstitutional and void.

In the cases cited there was no question but what the shipments *were in the ordinary course of business and were made in good faith and were in such packages as were ordinarilly* used in commercial transactions. It will not be contended by the defendants in this case that tobacco, even in the form of cigarettes, is not a legitimate article of commerce, in the same class with intoxicating liquors and subject to the police regulations of the state. It is certainly within the provisions of the legislature to declare how far tobacco in the form of cigarettes may be sold, and even their sale may be prohibited entirely after they have been taken from the "original package" or have left the hands of the importer provided no discrimination be used as against those imported from other states and there being no question but what the act was designed for the protection of the public health.

Austin vs. Tenn., *Supra.*

Original packages were defined in the same case to be such as are used in bona fide transactions carried on between the manufacturer and wholesale dealer residing in different states. Where the size of the package is such as to indicate that it was prepared for the purpose of evading the law of the state to which it is sent it will not be protected as an original package against the police laws of the state. *id.*

Where cigaretts are impoted in paper packages 3 inches in length and 1½ in width containing 10 cigarettes, (as in this case), unboxed or thrown in loosely into boxes; *held* that such paper parcels were not "original packages" within the meaning of the law and that such importations were evidently made for the purpose of evading the law of the state prohibiting the sale of cigarettes.

Austin vs. Tenn., *Supra.*

We urge that the decision in this case should turn precisely upon the matter in issue in the case of Austin

vs. Tenn., above referred to where it was held that the sales shown to have been made were not the sale of the "original package" in the true or commercial sense. The rule was there recognized that police regulations might be passed and be valid in restricting and preventing the sale of articles deletarious to public health or for the public safety or public morals even to the extent of requiring the discontiuuance of the manufacturing or traffic and even though a corporation might thereby suffer inconvenience and loss of property-rights.

Citing—Bartmeyer vs. Ia., 18 Wall., 129.

Beer Co. vs. Mass., 97 U. S., 25.

Muggler vs. Kas., 125 U. S., 623.

Such an act has been held not to be repugnant to the Constitution of the United States, in Foster vs. Kas., 112 U. S., 201.

In Powell vs. Penn., 127 U. S., 678, such a law was held with respect to the manufacture or sale of olemargarine to be a lawful exercise by the state of its power to protect by police regulation the public health and that it neither denied to persons within the jurisdiction of the state the equal protection of the law nor deprived them of their property without compensation and was not otherwise repugnant to the Fourteenth Amendment. The like rule was announced in Plumber vs. Mass., 155 U. S., 161, wherein the statute prohibited the sale of colored oleomargarine so as to look like yellow butter.

Wherever the enactment was a bona fida exercise of the police power dictated by concientious regard for the public health or safety in prohibiting the sale of obnoxious products such legislation has been respected though it might interfere directly with interstate commerce. In the legislature alone is necessarily vested the discretion to determine not only what legislation should be resorted to for the purpose of preserving the

public health, safety or morals or of the abating of public nuisance and the means necessary for the protection of such interests.

In the case of Brown vs. Maryland, 12 Wheaton, 419, it was conceded that so long as the packages remained in their original case they were not subject to taxation but this immediately ceased as soon as the boxes were opened. The same rule was followed in the case of May vs. New Orleans, 178 U. S., 496, where a mode of putting up a package is not adapted to meet the requirements of the state of commerce but the requirements of an unlawful retail trade the dealer will not be protected on the ground that he is selling a thing in an "original package."

In the case of Commonwealth vs. Fisherman, 128 U. S., 687, *held* that the defendant engaged in the sale of liquors at retail in pint bottles enclosed within pasteboard boxes which were shipped in barrels, was engaged in selling at retail and it is claimed he was selling "original packages" was little better than a burlesque.

"It is an established principal that the only way in which commerce between the States can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce; such as * * * the passage of inspection laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the *imposition of taxes* upon persons residing in the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the constitu-

tion and laws of the United States and the imposition of taxes upon all property within the state, mingling with and forming part of the great mass of property therein."

Robbins vs. Shelby Taxing Dist., 120 U. S., 489.

And even apart from the measures to protect health, the State may prescribe rules for the government of vessels whilst in its harbors; it may provide for their anchorage or mooring, so as to prevent confusion and collision; it may designate the wharves at which they shall discharge and receive their passengers and cargoes, and require their removal from the wharves when not thus engaged, so as to make room for other vessels. It may appoint officers to see that the regulations are carried out, and impose penalties for reusing to obey the directions of such officers; *and it may impose a tax* upon vessels sufficient for the expenses attendant upon the executions of these regulations.

Vanderbilt vs. Adams, 7 Cow., (N. Y.), 349.

In a leading case on this point Wilson vs. Black Bird, etc. Co., 2 Pet. (U. S.), 245, in which a State law authorizing the erection of a dam across a small navigable creek in order to exclude the tide and reclaim an unhealthy marsh, it was said * * * "if the fact that interstate commerce may be incidentally affected to an infinitesimal degree were held to prevent a State from exercising the most ordinary and necessary functions of government in a matter in which congress has shown no intention of acting, or from allowing its citizens to protect their own health or promote their own convenience, local self goverment would be at an end."

As was said in Sherlock vs. Alling, 93 U. S., 99: "Whatever congress determines, either as to a regulation (of commerce) or the liability for its infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights

and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of congress are silent, and the laws of the State govern * * * and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

The power to prescribe regulations to protect the health of the community, and prevent the spread of disease, is incident to all local municipal authority, however much such regulations may interfere with the movements of commerce.

Gloucester Ferry Co. vs. Penna., 114 U. S., 196.

Hence, the importation of diseased cattle from another State may be prohibited.

M. P. R. Co. vs. Finley, 38 Kan., 550.

And the importer may be held liable for the consequences of letting cattle which come from a dangerous district run at large.

Kimmish vs. Ball, 129 U. S., 217.

But all importaions of cattle, whether diseased or not, from other States, or certain of them, cannot be forbidden.

R. R. Co. vs. Husen, 95 U. S., 455.

Salzenstein vs. Mavis, 91 Ill., 391.

Arton vs. Sherlock, 75 Mo., 247.

A State law punishiug the sale of oleomargine colored with annotto is valid as applied to a sale by the agent of a manufacturer in another State and although the package sold had been sent from such other State for sale. Waterbury vs. Newton, 50 N. J. L., 534. The court said: "It seems proper to conclude that the package of oleomargarine with which we are now dealing became, on its delivery to the consignee in Jersey

City, subject to our laws relating generally to all articles of that nature in the State, unless those laws are opposed to the legislation of congress. Tne only federal law (on the subject) implies that the prohibition of such traffic (in oleomargarine) by State legislation is permissible."

In McGregor vs. Cohn, 104 Ia., 465, heretofore cited, it was *held* that the defendant was liable notwithstanding the internal revenue department had for the purpose of taxes declared the small packages sold by the defendant to be the "original package" and for that purpose they were separately taxed by the government.

The matters in issue in this case have been before the court in every variety of form which the ingenuity of the dealer could suggest. The rule which was founded for the protection of legitimate commercial interests has been deliberately assailed by law breakers in their attempts to thwart the legislative enactments adopted for the general good. Until the plaintiffs in error can show that they are conducting a legitimate business entitled to the protection of the law as a commercial transaction can they be heard to question the integrity of the courts in upholding the police regulations of the various states.

We believe that the holding of the supreme court of Iowa in denying relief to the plaintiff in error was justified, not only in applying every available and legitimate remedy for the evil attempted under the guise of interstate commerce, but had ample reason in the law for such decision.

Believing that plantiffs in error have no cause of complaint upon any constitutional question, we respectfully submit the cause.

F. E. NORTHUP,

Attorney for Defendants in Error.

Notice is here given that the attorney for defendant will make oral argument on the final submission hereof in reply to the oral argument by counsl for plaintiff in error.

FILED
DEC 2 1904

Term No. 150.

In the Supreme Court of the United States:

OCTOBER TERM, A. D. 1904.

IN EQUITY.

R. E. HODGE and
MRS. J. TABOR,
Plaintiffs in Error,
vs.
MUSCATINE COUNTY, et. al.
Defendants in Error.

Appeal from the Supreme Court of the State of Iowa.

ARGUMENT FOR DEFENDANTS IN ERROR.

HENRY JAYNE,
Attorney for Defendants in Error.

GERMAN-POSTEN PTG. CO. MUSCATINE

Term No. 160.

In the Supreme Court of the United States:

OCTOBER TERM, A. D. 1904.

IN EQUITY.

R. E. HODGE and
MRS. J. TABOR,
Plaintiffs in Error,
vs.
MUSCATINE COUNTY, et. al.
Defendants in Error.

Appeal from the Supreme Court of the State of Iowa.

ARGUMENT FOR DEFENDANTS IN ERROR.

HENRY JAYNE,
Attorney for Defendants in Error.

BONAWAY-PORTER PTG. CO. MUSCATINE

STATEMENT OF CASE.

In this case the following questions were raised upon which issues were joined:

(*a*) Whether or not cigarettes, shipped in a number of boxes, each box containing ten cigarettes, which boxes were given, absolutely loose, to an express company by the manufacturer in Missouri, with instructions to deliver them to a consignee in Iowa, were original packages in such sense that the person in Iowa selling the cigarettes by the box of ten cigarettes would be amenable to the laws of that state, by reason of such law being an attempt to regulate interstate commerce and, therefore, void;

(*b*) That the subject matter of Section 5007, of the Code of Iowa, was not included in the objects set forth in the title of the act, of which it is a part, to-wit: "An act to revise, amend and codify statutes in relation to crimes and punishments," because said section provides for the assessment, levy and collection of a tax and consequently, is not properly entitled, and is, therefore, void;

(*c*) That said Section 5007 is not uniform in operation and discriminates between jobbers and wholesalers doing an interstate business with customers outside the state, and the plaintiffs in error, who are inhabitants of the State of Iowa, and within its jurisdiction, and said section is, therefore, void;

(*d*) That the owner of the property wherein cigarettes were sold had no knowledge of such sales, nor any notice that a tax was assessed and levied against her property by reason

thereof, and that as said section does not provide for any notice and authorizes an assessment, said section is, therefore, void, because it authorizes the taking of property without "due process of law."

(*e*) That said Section 5007 violates Section 7 of Article 7 of the Constitution of the State of Iowa, because it does not *distinctly state the tax and the object to which it is* to be applied.

As the first three questions herein stated compose the case of Cook vs. Marshall County, No. 98, in this court, and are there argued, counsel for defendants in error in this case will confine himself to merely submitting a limited argument as to these three questions.

ARGUMENT

(a)

Is Section 5007 of the Code of Iowa an attempt to regulate interstate commerce and, therefore, void?

It is a well settled rule that whatever article of commerce is recognized as fit for barter or sale, when its manufacture is made subject to Federal regulation and taxation, must be regarded as a legitimate article of commerce although it may be within the police power of the states.

In re Rahrer, 140 U. S., 559.
Brown vs. Maryland, 12 Wheat. 419.
Leisy vs. Hardin, 135 U. S., 100.
Austin vs. Tenn., 50 L. R. A., 478.

And if Congress authorizes its importation, no State has a right to prohibit its introduction.

License Cases, 5 How., 504.

However, a state is not bound to furnish a market for such articles, or abstain from passing any law which may be necessary or advisable to guard the health or morals of its citizens, although such law may discourage importations or diminish profits of the importer.

Boston Beer Co. vs. Kas., 97 U. S., 25.
Mugler vs. Kas., 123 U. S., 623.
Foster vs. Kas., 112 U. S., 201.

Police power may be lawfully resorted to for the purpose of preserving public health, safety and morals; a large discrimination is necessarily vested in the legislature to deter-

mine what the public interests require and what measures are necessary for the protection of such interests.

Holden vs. Hardy, 169 U. S., 366, 392.

A State cannot prohibit the sale of articles of lawful commerce, when imported, by the importer, when such articles do not become a part of the common mass of property within the State, and so long as they remain in the original packages in which they were imported.

Leisy vs. Hardin, 135 U. S., 100.
Schollenberger vs. Penn., 171 U. S., 1.
Bowman vs. Railway Company, 125 U. S., 465.
State vs. Winters, 25 Pac. 237.
May vs New Orleans, 178 U. S., 496.
License Cases, 5 How., 504.
Brown vs. Maryland, 12 Wheat., 419.

An original package has been defined to be "such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers, *in the ordinary course of actual commerce.*"

Com. vs. Schollenberger, 156 Pa., 201.
McGregor vs. Cone, 73 N. W., 1043 (Iowa.)

And again, in Austin vs. Tenn., 50 L. R. A., 478, where the Court lay down the rule to be: That where the mode of putting up a package is not adapted to meet the requirements of inter-state commerce, *but the requirements of an unlawful domestic retail trade*, the dealer will not be protected on the ground that he is selling an original package.

Also, Com. vs. Bisham, 138 Pa., 639.
Haley vs. Nebr., 42 Nebr., 556, (60 N. W., 962.)

Com. vs. Paul, 170 Pa., 284.
State vs. Chapman, 47 N. W., 411.

That the size of the package is immaterial where bona fide transactions are carried on.

5 How., 608.
Comm. vs. Zelt, 138 Pa., 615.
Austin vs. Tenn., 50 L. R. A., 478.

The United States Revised Statutes, Section 3392, requiring cigarettes to be put in packages of 10, 20, 50 or 100 each, is for the purpose solely of taxation and the better enforcement of the internal revenue law.

To our mind there are two propositions which should be considered in determining this question:—

First: Is the transaction in good faith? and

Secondly: If so, were the packages shipped in the usual and ordinary manner and according to the customary usages of trade and commerce?

If the shipment was made in the customary way and in the course of a bona fide transaction, then the packages so shipped would come within the law regulating inter-state commerce and the packages and each of them would not be liable to taxation in the state of Iowa. If, on the other hand, this shipment was made for the sole purpose of testing the law; of attempting to find a loop-hole by means of chicanery and subterfuge, by which they could introduce an article held obnoxious and deleterious to good health and morals, into this state, then it cannot be said the transaction was in good faith.

The plaintiffs in error with a knowledge of the different decisions effecting this question opposite to their intentions and interests; in the face of the fact that

the article which they contemplated importing, was in itself highly injurious, deliberately associated themselves, as consignees, with persons whose past endeavors had been solely aimed at setting the law of the State at naught, and then and there allowed these manufacturers to send them such prohibited articles, in order that a foundation might be laid on some supposed technicality of law by which the will of the people of Iowa might be ruthlessly disregarded. Surely such a transaction, made under such conditions, cannot be held by this honorable Court to be bona fide transactions. The association of the parties under these circumstances alone, brands their operations with suspicion.

The Supreme Court of Iowa took occasion to state in Cook vs. Marshall county, 93 N. W., 372, in treating the manner of shipment by the American Tobacco Company to appellee as follows: "The care and precision with which we are told what the Tobacco Company did not do in making the shipment is no less conspicuous than the omission to tell what its agent, the Express Company, did do in that regard. * * Yet we know, as a matter of common observation and immemorial usage, that this is not the manner in which bona fide transtions are carried on between the manufacturer and wholesale dealer residing in different states, and is, therefore, not entitled to claim exemption attaching to inter-state commerce."

Secondly:

Can it be said that the customary and usual method of shipping cigarettes is to procure an Express Company to take a certain number of loose boxes of cigarettes piled in a heap, without box, wrapper, string or binding of any sort to hold them together, and carry them, in this condition, to a consignee in a sister State? With the exception of the case

of Ausin vs. Tenn., supra, (and there a basket was used by the Express Company to take the shipment of cigarettes), we have not one single case of record wherein a like and similar shipment of cigarettes, as is set forth in this case, has ever been made.

Viewing the transaction in the light of custom and sound reason, can it be honestly and sincerely contended that the packages of cigarettes in this case were shipped in an usual and ordinary manner, and according to the usages of trade?

If they were shipped *otherwise* and with the definite object of evading the laws of this state, then such packages, so shipped, are proper subjects of taxation, and Section 5007 is constitutional, as it does not attempt to regulate inter-state commerce.

(*b*)

It is contended that Section 5007 is unconstitutional in that it was enacted under Title 24 of Code of Iowa, "Of Crimes and their Punishments," and sub-title (Chapter 11), "Of Offenses Against Public Policy," and does not conform to Section 29, Article 3, of the Constitution of Iowa, to wit: "Every act shall embrace but one subject and matter properly connected therewith, which subject shall be expressed in the title."

In construing the law, courts will endeavor to put such an interpretation upon it as will avoid conflict with the constitution, resolving every reasonable doubt in favor of the statute and not against it; not regarding so much the form and manner of expression, as the *nature* and *object* of its provisions and the *end to be accomplished*; construing the act so as to support its validity; a brief and concise statement sufficient to indicate the nature of the act is all that is necessary;

the act should not be declared unconstitutional unless it is in such plain conflict with the constitution as to leave no discretion to the Court in the premises.

Black Const. Law, page 266, 58, 59.
58 Cal., 635; 2 Iowa, 280; 13 Minn., 341, 349.
68 N. Y., 381; 30 Iowa, 9; 61 Am. Dec., 338, n.
Am. Enc. Law, Vol. 6, 2d ed., p. 921, n.
20 Iowa, 338; 22 Atl. Rep., 923.
33 Hun., 279; 80 Mo., 678; 20 Fla., 522.
9 Ind., 380; 15 Tex., 311; 74 Am. Dec., 522.
61 Am. Dec., 331 n; 15 Ia., 304; 2 Ia., 165.

In this case, if Section 5007 is naturally and reasonably connected with the subject of the title, is cognate or germane thereto, and the subjects embraced have congruity, that is all that is necessary, the title is satisfied. If there is an "unity of object" in the different sections and the general object is stated in the title, it makes no difference as to how many diversified provisions the act may have, it is sufficient to comply with the constitution.

2 Cal., 289; 45 Mo., 495; 44 Ind., 151.
13 Neb., 121; 47 Minn., 578; 107 Ia., 111.
94 Iowa, 1; 51 Iowa, 197; 61 Am. Dec., 331.
State ex rel, Dwensing vs. Roby, 142 Ind., 168 (33L R. A., 219).
173 Ill., 19; 64 Am. St. Rep., 72, 73; 77 Pa. St. 77.

Section 5006 of the Code, prohibits the keeping for sale, selling and giving away of cigarettes, under a penalty of fine and imprisonment.

Section 5007 provides for the assessing of a mulct tax.

Section 5006 was first enacted under the present title,

(Laws 26th General Assembly, C. 96), and Section 5007 is an amendment thereto.

That Section 5006 was enacted to prevent the sale and gift of cigarettes certainly cannot be disputed. Section 5007, as an amendment thereto, is just as certainly intended to aid and enforce the suppression of the sale of cigarettes, because it provides for a tax "in addition to all other taxes and penalties," and is a "mulct" tax also, by reference to the mulct liquor tax. A mulct is a "fine imposed for an offense—a penalty."

Section 5006 is certainly germane to title 24 of Code of Iowa, and Section 5007 is equally germane and naturally and reasonably connected therewith because of the "unity of object" of the two sections—both being for the suppression and prevention of sale of cigarettes, but in a different manner; Section 5007 being an enlargement of the powers of, and an aid to Section 5006.

It is also contended, but we think without sufficient ground, that Section 5006, relating to criminal procedure, and Section 5007, relating to civil remedies and procedure, cannot be joined under title 24 of the Code.

If this be true, then many of the laws of the State of Iowa are null and void. (See Sections 4822 and Sections 4834 and 4835, of the Code of Iowa).

In State ex. rel. Duensing vs. Roby, 142 Ind, 168, (33 L. R. A., 219) where the construction of a title, similar with respect to ~~Section 29, Article 8, of Constitution~~ Title 24 of the Code of Iowa was passed upon, the Court say: "If the civil remedy under consideration, provided in the statute, extended to the suppression of all violations of law and public morals, or any part of them, outside of the things made unlawful in the

main part of the act, the case would be different and the act would embrace two independent and separate subjects of legislation. But the civil remedy provided has no connection with any other subject of legislation, either direct or remote. It has no connection with *any other crime* or *misdemeanor* than those *defined in the act.* Nor can it be used to suppress any other violation of law than those that fall *within* the *provisions* of *the act.* It is necessarily and inherently connected with the main part of the act."

Again in Perry vs. Gross, the Court say: "Objection is made to this amended statue that it is unconstitutional and void, because not within the scope of the act. It is claimed on behalf of plaintiff that this is a civil right and wholly inconsistent with punishment for a criminal offense. The object of the act is to prohibit gambling by imposing the additional penalty of requiring those, who engage in such practice, by reason of which persons lose money or property, to restore the same to the rightful owner. The title of the act is sufficient to authorize the legislators to make the amendment in question."

The Court further say: "The effect of the provisions of this section we are construing, is to *mulct* the winner in the loss of his gains and thereby it aids in *effecting* the *general object* of the act—the *suppression* of gambling."

Perry vs. Gross, 41 N. W., 799.

Larne d vs. Tiernan, 110 Ills., 173.

Section 5006 and 5007 were enacted as a part of the general codification of the laws of Iowa, as effected by the extra session of the 26th General Assembly, and being enacted together and relating to the same subject matter, it is evident that the two sections are to be construed as one, in dealing

with the cigarette question. (See Section 50, Code of (Iowa.) And section 5007 is not open to the constitutional objection that it does not conform to Section 29, article 3, of the Constitution of Iowa.

(c)

It is further contended that the statute relating to cigarettes discriminates and is not uniform in operation as between jobbers and wholesalers doing an interstate business with customers outside of the state and the plaintiffs in error who are inhabitants of the State of Iowa and within its jurisdiction and that said statute is, therefore, void.

The words "wholesalers and jobbers" clearly mean those who handle goods in the *bulk*; that is, buy the bulk or original package and sell by the bulk or original package, either for themselves or for others for whom they are agents.

73 N. W., 1041.

The exemption made in Section 5006, relating to wholesalers and jobbers is as follows: "Provided, ~~that~~ that the provisions hereof shall not apply to the sales of jobbers doing an interstate business with customers outside of the State."

Section 5007 says: "But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the State."

To interfere with one who resides in Iowa and who buys in the bulk or original package, with intent and does sell to customers outside of the State, is too clearly unconstitutional to need argument.

Austin vs. Tenn., 50, L. R. A., 478.
Leisy vs. Hardin, 135, U. S., 100, Iowa.
Minn. vs. Barber, 136, U. S., 313.

License Cases, 5 How., 504.

Construing the statute according to the adopted rules of interpretation, we find that both sections, 5006 and 5007, are silent as to prohibiting importers from importing cigarettes into the State of Iowa.

It has been said: "A State cannot, in the absence of legislation by Congress, ***prohibit importation*** of articles of lawful commerce from abroad or from a sister State; or, when imported, ***prohibit their sale*** by the importer when such articles do not become a part of the common mass of property within the State, and so long as they remain in the original packages in which they were imported."

Leisy vs. Hardin, 135, U., S., 100, Iowa.
Schollenberger vs. Penn., 171, U. S., 1.

We ask, then, can a State enact such laws as will tend to suppress and prevent the sale of articles dangerous to health, safety and morals of its citizens, sold within the State?

By way of answer to the above, it has been said in abundant authority that the "police power may be lawfully resorted to for the purpose of preserving public health, safety or morals, or abatement of public nuisances; a large discrimination is necessarily vested in the legislature to determine what public interests require and what measures are necessary for the protection of such interests."

Holden vs. Hardy, 169 U. S., 366, 392.
Boston Beer Co., vs. Kan., 97 U. S., 25.
Mugler vs. Kan., 123 U. S., 623.
Foster vs. Kas., 112, U. S., 201.
Austin vs. Tenn., 50, L. R. A., 478.

From the above authorities cited, it seems to be a well settled rule that wholesalers and jobbers may buy and import

in the bulk or original package and sell the same in the bulk or original package outside the State and escape taxation upon the article handled, while the same is within the state of their residence.

There is no discrimination here as the law clearly deals with those in a certain class, by which all who are in that class are governed alike.

If plaintiffs in error were wholesalers or jobbers doing business outside of the State, as above stated, it is plainly erroneous to tax them in this case; if they are not, and by their own admission they are not, and the State inherently possesses the power to tax, especially where public health, safety and morals are vitally concerned, then they cannot now complain because the State has exercised those rights which "in its nature acknowledges no boundary."

The wholesaler and jobber is precluded from doing such a business as plaintiffs in error are engaged in within the State by the laws of this State. Now, if any wholesaler could also claim exemption by reason alone of being a *wholesaler*, and at the same time be allowed to sell other than original packages within this State to citizens of this State, as plaintiffs in error have done, then the question of discrimination and uniformity of operation of these statutes might be legitimately raised; but such is not the case.

Plaintiffs in error knew of this Mulct Cigarette Tax; knew its terms, at least they are presumed in law to know them, and yet, they deliberately and intentionally violated this law –sold cigarettes, other than in original packages, publicly and openly, presumably to test its constitutionality. They cannot now complain. "He who seeks equity must do equity." From the above authorities, we would say that

section 5007 is not unconstitutional; that it *is* uniform in operation and does not discriminate.

(*d*)

Plaintiffs in error claim that section 5007 is unconstitutional in that it deprives an owner of his property "without due process of law."

In arguing this plea, it might be well to determine:

1. The nature of the tax imposed;

2. Is notice to owner of property assessed necessary thereunder.

No. 1. Section 5006 provides for a fine and imprisonment for selling cigarettes as follows: "For the first offense shall pay a fine of not less than $25.00 nor more than $50.00 and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and each subsequent offense, he shall pay, upon conviction thereof, a fine of not less than $100.00 nor more than $500.00 and costs of prosecution, or be imprisoned in the county jail not to exceed six months." * * * *

Section 5007 is as follows: "Tax on sale. There shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for use in making cigarettes or for the purpose of being filled with tobacco for smoking, are sold or given away, or *kept with* intent to be sold, bartered or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct

liquor tax, and shall be a perpetual lien upon all property, both personal and real used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the state."

As the above Section 5007 definitely refers to the mulct liquor tax, let us look at that for a moment.

Kinne, J., said in Smith vs. Skow, speaking of the mulct liquor tax: "This sum which is provided shall be a lien upon property, both personal and real is *not*, in fact, a *tax*, as we usually use the word. It matters not that the legislature, in the statute, speaks of this *license* or *charge* as a tax, that does not make it a *tax*. *It is in reality a charge* or *license exacted for the privilege of carrying on the business of vending* liquors, * * * * * As we have said, this is not a *tax*, and certainly not a *general tax*. * * * * * It is such a *charge* as attaches to and becomes a lien on the real estate when it is *assessed* and does not take priority over the lien of a mortgage then existing upon real estate."

Smith vs. Skow, 97 Iowa 640.

The mulct liquor tax, Section 2432, does not provide for a fine and imprisonment and in this it differs from the cigarette law.

As seen in Smith vs. Skow, supra, the mulct liquor tax is a charge or license on the occupation or business of selling liquors—it allows the selling under certain conditions. Section 5006 of the cigarette law absolutely prohibits the sale of cigarettes, under fine, * * and Section 5007 imposes

a tax "in addition to all other taxes and penalties" and stipulates that "the payment of such tax shall not be a bar to prosecutions" under Section 5006.

While the mulct liquor and mulct cigarette taxes are identical in that the tax imposed is on occupations, they are nevertheless, radically different in the objects sought to be gained thereby. The mulct liquor tax is a license which allows the sale of liquors; the cigarette tax is not a license, because Section 5006 positively forbids the sale of cigarettes under fine and imprisonment. (38 Ohio State, 206). The cigarette tax, in and of itself, is in the nature of an additional penalty, under police regulation to protect the public from the evils arising from the use of cigarettes, and, an occupation charge for the purpose of revenue.

Hodge vs. Muscatine County, 96 N. W. 969, Iowa.

The power to tax is inherent in the government. It is a legislative power and is limited only by constitutional provisions, subject thereto, it extends to *everything* and everybody, as the legislature *may see fit to apply it.* Courts cannot control its exercise, unless such exercise conflicts with constitutional limitations.

Am. & Eng. Ency. Law, Vol. 25, p. 18, and cases there cited.

Ferry vs. Deneen, 82 N. W., 424, Iowa.

27 Iowa, 28; 76 Ill., 561; 52 Wis. 53,

Hagar vs. Reclamation Dist. 111 U. S., 701.

The power to impose privilege and occupation taxes exists *independently* and *concurrently* in the state and Federal government, subject to constitutional restrictions; the only direct limitation therein contained, is, that no tax shall be laid on articles exported from any state. Being in the discretion

of the legislature, it may select *some* for this purpose and *exempt* others, and select the mode in which taxes shall be levied.

A. & E. E Law, Vol. 25, pages 21 n, 479, 481, 492.
Ward vs. Maryland, 12 Wall., 418; 5 How.; 504.
License Tax Cases, 5 Wall., 71; 69 Ill., 80.
U. S. Const. Art. 1, Sec. 9, Par. 5.
60 Am. Dec. 581; 133 Mass. 161.
62 Pa. St. 491; 89 Ga., 639; 33 Fed. Rep. 121.

It may be said that the demand made for money under the police power, is secondary to the police regulation out of which the demand grows; while in the case of taxation, the principal object is *revenue*. This distinction is not to be lost sight of, even though the procedure for collection may be *similar* in both cases.

A. & E. E. Law, Vol. 25, page 20.
46 Mich. 183; 46 Ill. 392.
Cooley on Taxation, 2 Ed. p. 586.
11 Johns, 77; License Cases, 5 Wall. 462.

"That a tax is imposed for the double purpose of regulation and revenue is no reason for declaring it invalid."

Hodge vs. Muscatine County, 96 N. W., 968;
2 Desty on Taxation, 1384.

An *occupation charge* is different from a *general tax*, and the constitutional provisions that all taxes shall be equal and uniform apply only to general taxation. It is sufficient if all in the same class are taxed alike.

A. E. E. Law, Vol. 25, pages 480, 481, 489.
49 Cal. 557; 102 Ill. 560; 11 Ohio St. 449.
46 N. J. Eq. 270; 62 Pa. St. 491; 89 Ga. 639.

33 Fed. Rep. 121; 4 Tex. 137; 6 Wall. 606.
82 N. W. 424; 29 Wis. 592; 84 Me. 215.
81 Va. 473; 66 N. W., 893, (Iowa.)

That an occupation tax is distinct from a general tax and that it was the intention of the legislators in enacting Section 5007 to so make the distinction, is seen from an examination of said section. It provides that "such tax shall be in *addition to all other taxes* and penalties." The tax is made distinct in itself, and it is provided that it shall have nothing to do with any *other* tax or penalty, by making such tax "in addition to *all* other taxes and penalties"; consequently it is not only made a charge but also a penalty by the very words of the statute itself.

The difference between a general tax and an occupation charge or tax, is that the general tax is assessed *solely* for revenue; while the occupation tax or charge may be assessed under police regulations, to protect public health and morals or public safety; the regulation of the object specified, and not for revenue.

A. E. E. Law, Vol. 25, p. 20.
Cooley on Taxation 2d Ed. p. 586.

From the above authorities and an examination of Section 5007, it seems that the tax therein imposed was for "indemnity and protection to the public against evils resulting from the nature and character of the business by taxing such business," and is also "in the nature of a police regulation, but is not to be wholly so regarded."

Hodge vs. Muscatine County, 69 N. W., 968.

NUMBER TWO. Is notice to the owner of the property assessed, necessary under the tax imposed by Section 5007?

As Section 5007 specifically and plainly refers to the mulct liquor tax in regard to assessment, etc., of taxes, as follows: "Such tax * * * * shall be assessed, collected and distributed in the same manner as the mulct liquor tax," it would, perhaps, be proper first to consider the mulct liquor tax with a view to the above proposition being applicable to it, before we pass upon Section 5007.

In the several Iowa cases the Supreme Court of that State in passing upon the Mulct Liquor Law, held, that such tax *was a charge* for carrying on the business and acted the same upon all persons and property coming within its provisions; that as the law was general in its scope and provisions, all persons liable thereunder must appear and pay the tax *without notice*, and that notice was "*no more necessary to the property owner than in cases of taxes generally.*"

Re Smith, 73 N. W., 605.

Smith vs. Skow, 66 N. W., 893.

It is further held that the tax imposed is also a penalty, and that the rules governing *ordinary* taxes *should not* govern in this case.

Ferry vs. Deneen, 82 N. W., 424.

We find that the Supreme Court of Iowa has determined that the tax provided in Section 5007 is a penalty and an occupation charge, (Hodge vs. Muscatine County, 96 N. W., 968). We also find that this same Court has held that the mulct liquor tax is a penalty, and an occupation charge, (Ferry vs. Deneen, 82 N. W., 424, and Smith vs. Skow, 66 N. W., 893); both taxes, then, because each is a penalty and an occupation charge, belong to the same class, and quoting, supra, "it is sufficient if all in the same class are taxed alike," (62 Pa. St., 491; 33 Fed. Rep., 121): We would then sub-

mit, that *no notice* being necessary in the mulct liquor tax, it would follow that *no notice* is necessary in the mulct cigarette tax.

The cigarette tax, by its terms, if nothing else, is different from a general tax, and the law of general taxation does not apply to it. Being a penalty and occupation charge, and the Legislature, inherently possessing that power incidental to sovereignty, may, in its discretion, and so long as there is no conflict with constitutional limitations, impose such tax upon any certain occupation for the protection of public health and morals, and provide and select the mode in which such tax may be assessed and levied. 6 Wall, ~~906~~ 606; 82 N. W., 424.

In determining in what mode this cigarette tax should be assessed, collected and distributed, we have but to read Section 5007, to find that it is to be assessed, collected and distributed in the same manner as the mulct liquor tax. As the provisions of the mulct liquor tax are, then, of the greatest importance in reaching a solution of this question, we give them in full; (before amendment by the Twenty-ninth General Assembly):

"Section 2433. RETURN BY ASSESSOR.—In the months of December, March, June and September of each year, and before the twentieth day of each of said months, the assessor of each township, town or city, or assessment district thereof, shall return to the County Auditor a list of persons who are, or since the last quarterly return have been, engaged in carrying on within said township, town, city or assessment district, the business of selling or keeping for sale intoxicating liquors, or maintaing any place where such liquors are sold or kept for sale, and also a description of the real property

wherein or whereon such business is carried on, or such place is maintained, with the name of the occupant or tenant and owner or agent. Any assessor wilfully failing to comply with the provisions of this section shall pay a fine of fifty dollars and costs for each offense." (Same, Sec. 2.)

SECTION 2436. QUARTERLY INSTALLMENTS—LIEN PENALTY.—On the first day of January, of April, of July and of October of each year, there shall be due and payable from each person returned to the County Auditor by the Assessor, or by three citizens as aforesaid, as a person carrying on the business of selling or keeping for sale, intoxicating liquors, or maintaining a place where such liquors are sold or kept for sale, a quarterly installment of the mulct tax herein provided for, and the tax due from any person so returned by the Assessors, or by three reputable citizens, shall be a lien upon the real property wherein or whereon such business is returned as being carried on, or such place maintained, whether the person carrying on such business, or maintaining such place, is correctly described or not. If the installments of tax due and payable, as aforesaid, are not paid within one month after the same become due and payable, then a penalty of twenty per cent shall be added thereto, together with one per cent per month thereafter until paid. Whoever is assessed under the provisions of this chapter shall be liable at least for one quarterly installment of the tax herein provided for, notwithstanding any such person may discontinue business when so assessed, and notwithstanding the fact that he may have been in the business for a less period than three months; and if he shall continue therein for a longer period than three months, he shall be liable for an additional quarterly installment, subject to abatement on account of discon-

tinuance of the business before the expiration of such second or subsequent quarter." (Same, Sec. 11.)

"Section 2437. LIST CERTIFIED TO TREASURER.—On the last day of December, of March, of June and of September, in each year, the County Auditor shall certify to the County Treasurer a complete list of the names of persons returned to him by the Assessors, or entered on the sworn statements made to him by citizens as aforesaid, together with a description in each case of the real property wherein or whereon the business is carried on, or the place maintained, and the name of the occupant or tenant, and the owner or agent of such property." (Same, Sec. 10.)

"Section 2438. ENTRY OF TAX.—The County Treasurer shall thereupon enter upon a book known as the 'mulct tax book' a quarterly installment of the mulct tax, as due and payable by the person carrying on such business, or keeping such place, and as a lien and charge upon and against the real property wherein or whereon such business is carried on, or such place maintained." (Same, Sec. 10.)

"Section 2439. WHEN DELINQUENT—SALES FOR.—After the expiration of one month from the date when such tax becomes due and payable, if not paid, it shall be delinquent and collectible by the Treasurer in the same method as that in which other delinquent taxes are collectible, and all the provisions as to the collection of other delinquent taxes shall apply. Tax sales for such delinquent taxes shall also be made on the first Monday in June of each year, in the same manner and to the same effect as on the first Monday in December, and all the provisions of law as to tax sales in December shall apply to such sales in June. When real es-

tate offered at tax sale under this section shall be passed for want of bid covering amount of tax due thereon, it shall be advertised and sold by the Treasurer at next semi-annual tax sale, to the highest bidder. (Same, Secs. 12, 13)."

"Section 2440. COLLECTION BY SELLING PERSONAL PROPERTY.—At any time after the quarterly installment of such taxes, becomes delinquent, the Treasurer may collect the same by seizing and selling any personal property used in connection with the business or in maintaining the place. (Same Sec. 13)."

"Section 2441. APPLICATION FOR REMISSON.—At the meeting of the board of supervisors next following the listing as aforesaid, application may be made to remit the tax, by petition duly verified and filed with the County Auditor at least eight days before the time set for the consideration of the case, and notice for the same length of time must be served on the county attorney in writing. The averments in the petition shall be deemed denied, and witnesses may be examined, and the Chairman of the Board, or, in his absence or inability to act, any member of the same may administer an oath in the same form and of the same effect as to penalties for testifying falsely as if administered in Court. (Same, Sec. 4)."

"Section 2442. HEARING—EVIDENCE—APPEAL. — On the application to remit the tax, the owner of the property may be heard in support of the same, and evidence of the general reputation of the place shall be admissible, and if upon the hearing of the case it shall be shown that the petitioner, his agent or tenant has paid a retail liquor dealer's internal revenue tax to the United States, covering any portion of the time and premises as set forth in the listing of said

real estate, it shall be prima facie evidence that the person and property are subject to the tax. If upon said hearing it be found by majority vote of the Board of Supervisors that the tax is proper, it shall stand, otherwise it shall be remitted and the Board shall enter its order on its record. Either the petitioner or the County Attorney may appeal to the District Court, and if the petitioner appeals he shall be required to give bond for the costs which have accrued, or may accrue in a further progress of the case. Notice of the appeal shall be served upon the appellee or his attorney, and upon the County Auditor within ten days after the decision by the Board of Supervisors; whereupon the Auditor shall file a full and complete transcript of the record of the proceedings in said cause, together with the original papers, in the office of the Clerk of the District Court in said county. In case the finding of the Board of Supervisors shall be against the tax, and the County Attorney shall fail to take an appeal to the District Court within ten days from such finding as above provided, any three citizens of the county may take such appeal within ten days thereafter, upon giving a good and sufficient bond for costs, and the same proceeding shall be had as if the appeal had been taken by the County Attorney. The Auditor shall charge and tax as fees for the transcript and writing up of the record, ten cents per hundred words. (Same Sec. 5)."

"Section 2444. TRIAL ON APPEAL—JUDGMENT AGAINST PROPERTY.—On the appeal the trial shall be conducted as an equitable cause, and the first term shall be the trial term. Should it appear, either on the trial before the Board of Supervisors or in the District Court, that there have been sales of intoxicating liquors made in or upon the premises listed

for taxation, the tax shall be confirmed against the person, corporation, or partnership conducting the business, and if it appears that the wrong name or an alias has been used, then the record and assessment list may be amended and the true name inserted; and if it shall appear at such trial that the owner or his agent knew, or by the use of reasonable care or diligence might have known, of the sales of intoxicating liquors as aforesaid, the tax shall be confirmed against the property by an order of record, and the Clerk of the District Court shall certify such fact to the County Auditor, with the amount of costs made in the trial of the case. (Same Sec. 6)."

It can be seen from the above sections that as usual, the administrative officers are empowered to collect taxes without the aid of any judicial process, and yet "due process of law" has not been violated. (Glidden vs. Harrington, 23 Sup. Ct. 574, 47 L. Ed. 798).

By the provisions of Section 5007 the manner of assessing, collecting and distributing the *liquor tax* is adopted as the mode of assessing, collecting and distributing the *cigarette tax;* its defects, if any, will effect the cigarette tax, and vice versa. The above sections were all enacted by the twenty-fifth Gen. Assembly, Ch. 62, at the same time and by the same act, and in construing and interpreting them, they should *all* be taken together to give the full force and effect to the act.

For example, suppose we say that Sections 2433 (which provides for the listing by the Assessor of persons liable to the tax), and 2435, (which also provides for listing by three citizens of the county), cannot be considered or given any weight in passing upon the act, will anyone question the

provisions of the subsequent sections to enforce the end sought—that of collecting taxes? If no one is empowered by law to list the persons liable for taxation, and no person is held for taxes, certainly any and all provisions for the collection of these taxes against any person are nugatory and ineffective for want of subject matter: How could A's property be legally sold under Section 2439, (which provides for a tax sale), if the Treasurer had no legal and official knowledge that such a person as A owned property, or even existed?

If, therefore, Sections 2433 and 2435 are *necessary* to give this act the full force and effect its originators intended it should have, then for a similar reason it would be improper and contrary to the rules of construction and interpretation to leave out, separate and not consider Sections 2441, 2442 and 2444—other sections of the same act, which give the tax-payer opportunity to be heard before his property can be taken for the non-payment thereof.

Sections 2441, 2442 and 2444 provide "for a board of revision, authorized to hear complaints respecting the justice of an assessment, and prescribe the time during which, and the place where such complaints may be made." (Hodge vs. Muscatine County, 96 N. W., 968). It has been held that a tax law to be constitutional, cannot take property for the non-payment of taxes, unless the tax-payer has the opportunity to be heard in relation thereto, and that such tax, so taken, is not without "due process of law." "The meetings of the board of revision are fixed by law, and of these all persons must take notice."

Hodge vs. Muscatine Co., 96 N. W., 968.

Palmer vs. McMahon, 10 Sup. Ct., 327, 33 L. Ed., 772.

Glidden vs. Harrington, 23 Sup. Ct., 574; 47 L. Ed., 798.

The intention of Sections 2441, et seq., is to provide, and they do provide, such measures as take the liquor tax law from under the prohibition of "taking property without due process of law;" said sections certainly save the law from that objection, and consequently, no notice to the owner of the property assessed and levied upon is necessary. (Davidson vs. New Orleans, 96 U. S., 97, 24 L. Ed., 616). Nor is it necessary that the person who conducts the business be present or have an opportunity to be present, when the assessment is made. (McMillan vs. Anderson, 95 U. S., 87, 24 L. Ed., 335).

Consequently, Section 2441, et seq., being as much a part of the provisions of the mulct liquor tax as Sections 2438 and 2435, they should be considered along with the other sections in determining the constitutionality of the cigarette tax in Section 5007, because said Section 5007, by its terms, includes those provisions of the mulct liquor tax relating to the assessing, collecting and distributing such tax.

As a conclusion, we therefore think that the cigarette tax, Section 5007, is in the nature of a penalty and an occupation charge; that it is assessed, collected and distributed the same as the mulct liquor law; that no notice to a property owner is necessary to be given; that the objection that it "takes property without due process of law" is without foundation, and that said section is, therefore, constitutional.

(e)

Is Section 5007 in contravention of Section 7, Article 7, of the Constitution of Iowa?

Article 7 of the Constitution is entitled "State Debts," and Section 7, under such title, reads as follows: "Every law which imposes, continues or revives a tax, shall distinctly state the tax, the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."

As the above Section 7 is part of the Article "State Debts," and Section 7 provides for a tax—such tax must be for the purpose of meeting the "State Debts," and the Article and Section are nothing more than a law for general taxation and creation of general taxes.

We believe the cigarette tax is not a general tax, nor subject to the law of general taxation, but, rather, in the nature of a penalty and an occupation charge, (Ferry vs. Deneen, 82 N. W., 424, and Smith vs. Skow, 66 N. W., 893), and that any law relating to general taxes, such as Section 7, and especially Article 7 provides, does not apply to this tax question. (102 Ill., 560.)

Is the tax distinctly stated?

Section 5007 says: "There shall be assessed a tax of three hundred dollars per annum against every per on, etc., and upon the real property and the owners thereof, within and whereon any cigarettes, etc., are sold or given away, or kept with the intent to be sold, bartered or given away, under any pretext whatever."

A statute should be construed "according to the context and the approved usage of the language." * * *

Section 48, Par. 2, Code of Iowa.

Taking this rule for the constructing of Section 5007, we find said Section distinctly stating that the tax shall be: "a tax of three hundred dollars per annum * * * ," and there can be no question but that the tax is mentioned and is definite.

Is the object of the tax stated?

We also find said Section distinctly stating the object of the tax, in the heading: "Tax for *Sale*," also in the body thereof: " * * * within and whereon any cigarettes are sold or given away, or kept with the intent to be sold, bartered or given away under any pretext whatever." There can be no question but that the main point or object to which the tax is to be applied is the sale or gift of cigarettes. By the terms of the Section, it does not refer to any other law to fix such tax or object.

We would, therefore, say that Section 5007 is within the meaning of Section 7, Article 7 of the Constitution of Iowa, as it specifically provides for the "fixing" of the tax, its "object" and does not refer to any other law to "fix such tax or object."

It is a self evident truth, that if the legislature has certain definite powers to enact laws, as for instance, to enact any law relating to the mode, form and extent of taxation within its jurisdiction, which is not in conflict with the Constitution of the United States, and, in enacting such law, enacts it by virtue of those certain definite powers, then the act in question will be valid and constitutional. In this case, the legislature, having an unlimited power of taxation, and, not in violation of the Federal Constitution, have seen fit to enact a law taxing the sale, etc., of an article injurious to health and morals, under that sovereign right, certainly, then the legis-

Supreme Court of the United States.

No. 98.—October Term, 1904.

Charles P. Cook et al., Plaintiffs in Error, vs. The County of Marshall, Iowa. } In error to the Supreme Court of the State of Iowa.

[January 16, 1905.]

This was a petition by the owner and tenant of a certain room in the city of Marshalltown, Iowa, addressed to the board of supervisors, for the remission of a tax of $300, imposed upon the business of selling cigarettes, which business was carried on by Charles P. Cook, one of the plaintiffs in error. The petition being denied, an appeal was taken to the District Court, where a demurrer was interposed, which was sustained by that court, and an appeal taken to the Supreme Court, where the judgment of the District Court was affirmed. (119 Iowa, 384.)

Mr. Justice Brown delivered the opinion of the Court..

This case involves the constitutionality of section 5007 of the Iowa Code, imposing a tax of $300 per annum upon every person, and also upon the real property and the owner thereof, whereon cigarettes are sold or kept for sale. The section is printed in full in the margin.*

The facts of the case were that the plaintiff, Charles P. Cook, carried on a retail cigar and tobacco store upon premises leased by him from his co-plaintiff. Cook ordered his cigarettes of the American Tobacco Company, at St. Louis. They were delivered to an express company, and brought by such company from St. Louis, or other places outside of the State of Iowa,

* Sec. 5007. Tax on sale.—There shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarettes wrapper, or any paper made or prepared for the use in making cigarettes, or for the purpose of being filled with tobacco for smoking, are sold or given way, or kept with the intent to be sold, bartered or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property, both personal and real, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes, or cigarettes paper or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the State.

directly to the place of business of the plaintiff, in small pasteboard boxes, containing ten cigarettes each, each package being sealed and stamped with the revenue stamp. These packages were shipped absolutely loose, and were not boxed, baled, wrapped or covered, nor were they in any way attached together. Nothing appears in the record to indicate the means used in transporting these cigarettes from the factory of the manufacturer to the place of business of the retail dealer, and we are left to infer that they were shoveled into and out of a car, and delivered to plaintiffs in that condition. The packages were not separately or otherwise addressed, but at the time they were delivered to the express company the driver gave a receipt showing the number of packages and the name of the person to whom they were to be sent, retaining a duplicate himself.

The constitutionality of the act as applied to the plaintiffs was attacked upon two grounds:

(1) That it was an attempt to interfere with the power of Congress to regulate commerce between the States.

(2) That it denied to the plaintiffs the equal protection of the laws.

The argument of the plaintiffs is the same as that which was pressed upon our attention a few years ago in *Austin* v. *Tennessee*, (179 U. S. 343,) that the packages of ten cigarettes were each the original packages in which these cigarettes were imported from other States, and that under the decisions of this court in *Brown* v. *Maryland*, (12 Wheat. 419;) *Leisy* v. *Hardin* (135 U. S. 100) and *Shollenberger* v. *Pennsylvania*, (171 U. S. 1.) they were entitled to the immunities attaching to original packages. We reviewed these and a large number of other cases in our opinion, and came to the conclusion that these boxes were in no just sense original packages within the spirit of the prior cases, and that their shipment in this form was not a *bona fide* transaction, but was merely a convenient subterfuge for evading the law forbidding the sale of cigarettes within the State. This case differs from that only in the fact that in the Austin case the packages were thrown loosely into baskets, which were shipped on board the train and carried to Austin's place of business. These baskets, it is argued, might have been considered as the original packages.

This difference, however, was not insisted upon as distinguishing the two cases in principle. Indeed it was admitted to be one not of "great magnitude or seeming legal significance." The main argument of the plaintiffs was frankly addressed to a reconsideration of the principle involved in the Austin case, and a reinsistence upon the position there taken, that the packages in which the cigarettes were actually shipped must govern, and that we cannot look to the motives which actuated such shipment, or to the fact that ordinary importations of cigarettes were made in boxes containing a large number of these so-called original packages. We have carefully reconsidered the principle of that case, and, without re-

peating the arguments then used in the opinions, we have seen no reason to reverse or change the views there expressed.

The term original package is not defined by any statute, and is simply a convenient form of expression adopted by Chief Justice Marshall in *Brown* v. *Maryland*, to indicate that a license tax could not be exacted of an importer of goods from a foreign country who disposes of such goods in the form in which they were imported. It is not denied that in the changed and changing conditions of commerce between the States, packages in which shipments may be made from one State to another may be smaller than those "bales, hogsheads, barrels or tierces," to which the the term was originally applied by Chief Justice Marshall, but whatever the form or size employed there must be a recognition of the fact that the transaction is a *bona fide* one, and that the usual methods of interstate shipment have not been departed from for the purpose of evading the police laws of the States.

In *Leisy* v. *Hardin*, (135 U. S. 100,) quarter barrels, and even one-eighth barrels and cases of beer, were recognized as original packages or kegs, though the size of such packages and the usual methods of transporting beer do not seem to have been made the subject of discussion. There is nothing in the opinion to indicate that it was not legitimate to ship beer in kegs of this size. So, too, in *Shollenberger* v. *Pennsylvania*, oleomargarine transported and sold in packages of ten pounds weight was recognized as *bona fide*, but it was expressly found by the jury in that case that the package was an original package, as required by the act of Congress, and was of such "form, size and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size and weight were adopted in good faith, and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment, shipped by the said company to the said defendant." While it may be impossible to define the size or shape of an original package, the principle upon which the doctrine is founded would not justify us in holding that any package which could not be commercially transported from one State to another as a separate importation could be considered as an original package.

But it is insisted with much earnestness that in determining the lawfulness of sales in original packages we are bound to consider that package as original in which the articles were actually shipped, particularly where Congress, for the purposes of taxation, has prescribed a certain size of package to be separately stamped, and that we have no right to look beyond the letter of the term and inquire into the motives which dictated the size of the packages in each case. This argument was also made in

the Austin case, was considered at some length, and held to be unsound. In delivering the opinion we said, (p. 359): "The real question in this case is whether the size of the package in which the importation is actually made is to govern, or the size of the package in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States. We hold to the latter view. The whole theory of the exemption of the original package from the operation of State laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country."

While it is doubtless true that a perfectly lawful act may not be impugned by the fact that the person doing the act was impelled thereto by a bad motive, yet where the lawfulness or unlawfulness of the act is made an issue the intent of the actor may have a material bearing in characterizing the transaction. We have had frequent occasions to treat of this subject in passing upon the validity of legislative acts or municipal ordinances. So where the lawfulness of the method used for transporting goods from one State to another is questioned, it may be shown that the intent of the party concerned was not to select the usual and ordinary method of transportation, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the State. If the natural result of such method be to render inoperative laws intended for the protection of the people, it is pertinent to inquire whether the act was not done for that purpose, and to hold that the interstate commerce clause of the Constitution is invoked as a cover for fraudulent dealing, and is no defence to a prosecution under the State law.

The power of Congress to regulate commerce among the States is perhaps the most benign gift of the Constitution. Indeed it may be said that without it the Constitution would not have been adopted. One of the chief evils of the confederation was the power exercised by the commercial States of exacting duties upon the importation of goods destined for the interior of the country or for other States. The vast territory to the west of the Alleghanies had not yet been developed or subdivided into States, but the evil had already become so flagrant that it threatened an utter dissolution of the confederacy. The article was adopted that all of States of the Union might have the benefit of the duties collected at the maritime ports, and to relieve them from the embarrassing restrictions imposed upon the internal commerce of the country. But the same policy which authorizes the use of this power as a shield to protect commerce from the vexatious interference of the States forbids its employment as a sword to assail measures designed for the preservation of the public health, morals, and comfort. States may differ among themselves as to the necessity and scope of such measures, but so long as they are adopted

in good faith, with an eye single to the public welfare, they are as much entitled to the recognition of the General Government as if they were uniformly adopted by all the States.

While this court has been alert to protect the rights of non-resident citizens and has felt it its duty, not always with the approbation of the State courts, to declare the invalidity of laws throwing obstacles in the way of free intercommunication between the States, it will not lend its sanction to those who deliberately [illegible] to debauch the public conscience and trample upon the laws of a State. The power of Congress to regulate commerce is undoubtedly a beneficent one. The police laws of the State are equally so, and it is our duty to harmonize them. Undoubtedly a law may sometimes be successfully and legally avoided if not evaded, but it behooves one who stakes his case upon the letter of the Constitution not to be wholly oblivious of its spirit. In this case we cannot hold that plaintiffs are entitled to its immunities without striking a serious blow at the rights of the States to administer their own internal affairs.

2. The argument that section 5007 of the Iowa Code denies to the plaintiffs the equal protection of the laws is based upon an alleged discrimination arising from the final sentence that "the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the State."

We are referred in this connection to a series of well-known cases arising under the anti-trust laws of the several States, to the effect that laws against combinations in trade must be uniform in their application as applied to all persons within the same general class. The leading case upon this point is *Connolly* v. *Union Sewer Pipe Company*, (184 U. S. 540,) where a law of Illinois against combinations to regulate prices and productions, and create restrictions, was held to be invalid by reason of the exemption of agricultural productions or live stock while in the hands of the producer or raiser.

A similar case is that of *Cotting* v. *Stock Yards Company*, (183 U. S. 79,) wherein a statute of Kansas regulating the prices to be paid for the use of public cattle stock yards was held invalid by reason of the fact that it was intended to apply only to the stock yards of Kansas City, and not to other companies or corporations engaged in like business in other portions of the State.

These cases, however, have but limited application to laws imposing taxes, where the right of classification is held to permit of discrimination between different trades and callings when not obviously exercised in a spirit of prejudice or favoritism. (*Kentucky Railroad Tax Cases*, 115 U. S. 321; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *American*

Sugar Refining Company v. *Louisiana*, 179 U. S. 89; *Bell's Gap Railroad Company* v. *Pennsylvania*, 134 U. S. 232.)

This distinction was recognized by Mr. Justice Harlan in *Connolly* v. *Union Sewer Pipe Company*, on page 562, wherein it is said "a State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States." It can scarcely be doubted that, if the Connolly case had dealt with the subject of taxation, a discriminative tax upon producers of agricultural products, either greater or less than that imposed upon other manufacturers or producers, might have been held valid without denying to either party the equal protection of the laws. The holding in that case was simply that, considering that the object of the statute was to prevent combinations of capital or skill for certain purposes, the exemption of farmers was based upon no sound distinction, and rendered the law invalid as to other classes included within it.

There is a clear distinction in principle between persons engaged in selling cigarettes generally or at retail, and those engaged in selling by wholesale to customers without the State. They are two entirely distinct occupations. One sells at retail, the other at wholesale; one to the public generally, and the other to a particular class; one within the State, the other without. From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers, wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturers of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned.

Why the legislature should have made the distinction found in section 5007 is not entirely clear, but it probably arose from the belief that the imposition of a license tax upon wholesale exporters of cigarettes would be as much an interference with interstate commerce as the imposition of a similar tax upon importers from abroad was held to be in *Brown* v. *Maryland*. We are satisfied the section is not open to the objection of denying to the dealers in cigarettes the equal protection of the laws.

The judgment of the Supreme Court is, therefore,

Affirmed.

Mr. Justice WHITE, concurring:

The only difference between this and the Austin case is that in this no basket was used to hold the many small packages shipped at one and the

same time to the same person. In my opinion, such fact is not sufficient to take the case out of the reach of the reasoning stated by me for concurring in the decree in the Austin case. For the reasons given for my concurrence in that case I concur in the judgment rendered in this.

The CHIEF JUSTICE, Mr. Justice BREWER and Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 150.—October Term, 1904.

Robert E. Hodge et al., Plaintiffs in Error, vs. Muscatine County et al. } In error to the Supreme Court of the State of Iowa.

[January 16, 1905.]

This was a petition in the District Court by the owner and tenant of certain real estate in Muscatine, used for a tobacconist's shop, to enjoin the defendants from assessing and collecting a tax of $240, upon the ground of the unconstitutionality of the law.

Demurrers were interposed to the petition and to certain amendments thereto, which were sustained, the bill dismissed, and an appeal taken to the Supreme Court of Iowa, which affirmed the judgment of the court below. (121 Iowa, 482.)

Mr. Justice Brown delivered the opinion of the Court.

This case involves the same questions as those just disposed of in *Cook* v. *Marshall County*, and in addition thereto the point is made that the laws of Iowa deny to the owner of property leased for the sale of cigarettes due process of law.

To answer satisfactorily the question thus presented, it is necessary to consider the laws of Iowa respecting the tax upon cigarette dealers, and the methods of enforcing the same.

By section 5006 a fine and imprisonment are imposed for selling cigarettes.

By section 5007, printed in full in the Marshall County case, a tax of $300 per annum is assessed "against every person . . . and upon the real property and the owner thereof," whereon cigarettes, etc., are sold, or kept with intent to be sold, with a provision that "such tax shall be in addition to all other taxes and penalties, shall be assessed, collected, and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property, both personal and real, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting" the selling of cigarettes.

This assessment is made collectible as is a similar charge made upon dealers in liquor as follows:

By section 2433 the assessor makes quarterly returns to the auditor of the persons liable to the tax, and a description of the real property whereon the business has been carried.

By section 2436 the charge is made payable in quarterly installments, and shall be a lien upon the real property.

By section 2437 the auditor certifies quarterly to the county treasurer a list of the names returned to him by the assessor, with a description of the names of the tenant and owner.

By section 2438 the county treasurer enters upon the mulct tax book a quarterly installment of the tax as a lien and charge upon the real property.

By section 2439, if the tax is not paid within a month, it shall be considered delinquent and be collectible as other delinquent taxes.

By section 2440 the treasurer may collect the same after it has become delinquent, by seizing and selling any personal property.

By section 2441 application may be made to the board of supervisors to remit the tax by petition duly verified and filed with the county auditor eight days before the time set for the consideration of the case, notice of which must be served upon the county attorney.

By section 2442 the owner of the property may be heard in support of his application. A majority of the board determines whether the tax shall stand or be remitted, and either party may take an appeal to the District Court.

These are all of the provisions of the law material to be considered.

We do not deem it necessary to affix a definition to the charge imposed by section 5007. It is certainly not an ordinary license tax, as the payment of such tax is no bar to a prosecution for selling cigarettes under section 5006. In *Smith* v. *Skow*, (97 Iowa, 640,) it is said, in speaking of the mulct liquor tax, to which this is analogous, that though called a tax in the statute, it is not in fact a tax as we usually use the word. "It is in reality a charge or license for carrying on the business of vending liquors, which charge is made a lien upon all property used or connected with the business." In *Ferry* v. *Deneen*, (82 N. W. Rep. 424,) it is observed by the same court, "it is apparent, taking all the provisions of this act together, that the amount imposed, while called a 'tax,' is at the same time a penalty."

But in the opinion of the court in the case under consideration, the charge imposed by section 5006 is said to be "clearly not a license, for it does not grant permission to do an act, which without such permission would be invalid, . . . that it is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business but as a deterrent against engaging therein. . . . Indeed, we think it may fairly be said to be a tax upon the business. That a tax is imposed for the double purpose of regulation and revenue is no reason for declaring it invalid. Being a tax, it was competent for the legislature to prescribe the proceedings and processes for its collection."

This being the latest expression of opinion of the Supreme Court of Iowa, we accept it for the purposes of this case. If it be not a construction binding upon us, it is, at least a construction which we ought to follow, unless we are clearly of opinion that it is wrong.

In the case of *McBride* v. *The State* (70 Miss. 716,) cited by plaintiffs, it was held that a statute providing that a person selling liquor unlawfully should be subject to pay, "where the offence is committed," the sum of $500, and should also be liable to a "criminal prosecution," imposed a penalty and not a tax, and that a proceeding to collect such penalty by distress was unconstitutional; but a distinction was drawn in that case between a penalty and a tax, and it was intimated that a proceeding by distress to collect a tax would not be open to a like objection.

It is not easy to draw an exact line of demarkation between a tax and a penalty, but in view of the fact that the statute denominates the assessment a "tax," and provides proceedings appropriate for the collection of a tax, but not for the enforcement of a penalty, and does not contemplate a criminal prosecution, we cannot go far afield in treating it as a tax rather than a penalty. Section 5006 does indeed impose a penalty, but section 5007 imposes a tax, with an additional provision that the payment of the tax shall not absolve the party from the penalty. It would be a distortion of the words employed to speak of section 5007 as imposing an additional penalty. The act itself provides in terms that such tax shall be an addition to all other taxes *and penalties*, and elaborate provision is made for its enforcement. The mere fact that the charge, whatever it may be, is made a lien upon the real estate and a personal claim against the landlord indicates that it is the nature of a tax rather than a penalty.

There is no conflict between the two sections, the State reserving to itself an election to proceed under the one or the other. If Congress may provide that a license granted by it to sell liquors shall not be construed to authorize the sale of such liquors when prohibited by the laws of the State, as was held by this court in *McGuire* v. *Commonwealth*, (3 Wall. 387; (*The License Tax Cases*, (5 Wall. 463;) *Commonwealth* v. *Crane*, (158 Mass. 218;) *Pervear* v. *Commonwealth*, (5 Wall. 475,) we see no reason why the State itself may not exercise the same power and reserve to itself the right to tax or prohibit, as in individual cases it may see fit.

2. Coming now to the provisions for its enforcement, it is entirely clear that, as to the person actually carrying on the business, no notice of the assessment or levy of the tax is necessary. If the person carries on the business, the imposition of the tax follows as a matter of course. There is no discretion as to the amount. (*McMillen* v. *Anderson*, 95 U. S. 37; *Hager* v. *Reclamation District*, 111 U. S. 701; *Turpin* v. *Lemon*, 187 U. S. 51; *In re Smith*, 104 Iowa, 199.)

It was within the power of the legislature to make the tax a lien upon the property whereon the business was carried. If general taxes upon real estate and specific taxes for improvements thereto, including pavements, sidewalks, sewers, the opening of streets and keeping them clean, may be made liens upon the property affected, it is difficult to see why a tax upon the business carried on upon such property may not be made a lien as well as a claim against the owner. The owner is not only chargeable with a knowledge of the law in respect thereto, but he is presumed to know the business there carried on, and to have let the property with knowledge that it might become encumbered by a tax imposed upon such business. (*Sheldon* v. *Van Buskirk*, 2 N. Y. 473; *Brown Shoe Co.* v. *Hunt*, 103 Iowa, 586; *Polk Co.* v. *Hierb*, 37 Iowa, 367; *State* v. *Snyder*, 34 Kan. 425; *Hardten* v. *State*, 32 Kan. 637; *Sears* v. *Cottrell*, 5 Mich. 251; *Walderon et al.* v. *Lee*, 5 Pick. 323; *Spencer* v. *McGowen & Shepard*, 13 Wend. 256; *Simpson* v. *Serviss*, 2 Ohio Circuit Decisions, 246.)

Acts of Congress impressing liens upon real estate for taxes or penalties arising from business illegally carried on there, have been the frequent subject of controversy in this court.

Conceding that the landowner is entitled to notice before he can be personally liable, or before his property can be impressed with a lien, we are of opinion that he is protected by sections 2441 and 2442, which permits him to make application at the meeting of the board of supervisors next following the listing of the property, the sessions of which board are fixed by law, (Iowa Code, sec. 412,) to remit the tax. This application may be made at any time after the property has been assessed, upon eight days' notice being given to the county attorney. Witnesses are examined under oath before the board, which determines by a majority vote whether the tax shall stand or be remitted. If the petition be denied, the owner of the property can appeal to the District Court for a judicial determination of his liability. This is sufficient. If the taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, whether the proceedings for review take place before a board having a *quasi* judicial character, or before a tribunal provided by the State for the purpose of determining such questions, due process of law is not denied. It was held by this court in *Pittsburg &c. R. R. Co.* v. *Backus*, (154 U. S. 421, 426,) that a hearing before judgment, with full opportunity to present the evidence and the arguments which the party deems important, is all that can be adjudged vital. See also *King* v. *Mullins*, (171 U. S. 404.)

In the amendment to the petition in this case the landowner states that she had no knowledge whatever that her real estate was being used for the sale of cigarettes until after the assessment was levied, and never consented to the same; that she resides in Illinois, and rented the property through an agent, who had had no knowledge himself of the sale of

cigarettes upon the premises. There is no allegation, however, that she did not have knowledge within ample time to make application to the board of supervisors for the remission of the tax. If such application had been made, it would have been the duty of the board to take the matter into consideration and determine whether her want of knowledge would justify the remission of the tax. It is not for us to determine whether the defense be a valid one, since, having the opportunity to make it, she declined to do so.

The question is made whether section 5007 violates the Constitution of Iowa in not stating distinctly the tax and the object to which it is to be applied, but as this is purely a local question, we are not called upon to consider it.

Affirmed.

The CHIEF JUSTICE, Mr. Justice BREWER and Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.